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Draft report of the International Law Commission on the work of its seventieth session

Rapporteur: Ms. Patricia **Galvão Teles**

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Provisional application of treaties

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A. Introduction

1. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.[1] In its resolution 67/92 of 14 December 2012, the General Assembly subsequently noted with appreciation the decision of the Commission to include the topic in its programme of work.

2. The Special Rapporteur submitted four reports from 2013 to 2016,[2] which the Commission considered at its sixty-fifth to sixty-eighth sessions (2013–2016), respectively. The Commission also had before it three memorandums, prepared by the Secretariat, which were submitted at the sixty-fifth (2013), sixty-seventh (2015) and sixth-ninth sessions (2017), respectively.[3]

3. On the basis of the draft guidelines proposed by the Special Rapporteur in the third and fourth reports, the Commission, at its sixty-eighth session (2016), took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee. Owing to a lack of time, it was decided to consider draft guidelines 5 and 10 at the next session.

4. At its sixty-ninth session (2017), the Commission referred draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee in 2016, back to the Committee, with a view to finalizing a consolidated set of draft guidelines. The Commission subsequently provisionally adopted draft guidelines 1 to 11, as presented by the Drafting Committee at the same session, with commentaries thereto.

B. Consideration of the topic at the present session

5. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/718), in which he analyzed the comments made by States and international organizations on the 11 draft guidelines provisionally adopted by the Commission at its sixty-ninth session, provided additional information on the practice of international organizations, and submitted two new draft guidelines, 5 *bis* and 8 *bis*, concerning reservations and termination or suspension, respectively, as well as eight draft model clauses.[4] The Commission also had before it the third memorandum prepared by the

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[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267.

[2] A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

[3] A/CN.4/658, A/CN.4/676 and A/CN.4/707. The consideration of document A/CN.4/707 was postponed to the present session.

[4] The text of the draft model clauses proposed by the Special Rapporteur, in his fifth report (A/CN.4/718), excluding footnotes, reads as follows:

A. Time frame for the provisional application of a treaty

1. Commencement

Draft model clause 1

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from the date of signature (or any subsequent date agreed upon).

Draft model clause 2

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from … [a specified date].

Draft model clause 3

The negotiating [contracting] States [international organizations] agree that the Treaty [articles … of the Treaty] shall be applied provisionally, except by any State [international organization] that notifies the Depositary in writing at the time of signature that it does not consent to such provisional application.

Secretariat (A/CN.4/707), reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.

6. At its 3402nd to 3406th and 3409th meetings, from 14 to 18 and 22 May 2018, the Commission considered the fifth report of the Special Rapporteur and the third memorandum of the Secretariat. At its 3409th meeting, on 22 May 2018, the Commission decided to refer draft guidelines 5 *bis*, 8 *bis* and the eight draft model clauses to the Drafting Committee, and instructed it to complete the first reading of the entire set of draft guidelines, including those adopted provisionally at the sixty-ninth session (2017), taking into account the comments and observations of Governments and the debate in the plenary on the Special Rapporteur's report.

7. The Commission considered the report of the Drafting Committee (A/CN.4/L.910) at its 3415th meeting, held on 31 May 2018, and adopted draft guidelines 6 [7], 7 [5 *bis*], 9, 10, 11 and 12. The Commission then proceeded to adopt the entire set of draft guidelines on provisional application of treaties, as the draft Guide to Provisonal Application of Treaties, on first reading (see section C.1 below). The Commission further took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses, based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee.

8. At its … to … meetings, on … 2018, the Commission adopted the commentaries to the aforementioned draft guidelines (see section C.2 below).

9. At its … meeting, on … 2018, the Commission further expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines constituting the draft Guide to Provisional Application of Treaties.

Draft model clause 4

This Treaty shall be applied provisionally from the date on which a State [an international organization] so notifies the other States [international organizations] concerned or deposits a declaration to that effect with the Depositary.

2. Termination

Draft model clause 5

The provisional application of this Treaty shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally.

Draft model clause 6

The provisional application of this Treaty with respect to a State [an international organization] shall be terminated if that State [international organization] notifies the other States [international organizations] (or the Depositary) of its intention not to become a party to the Treaty.

B. Scope of provisional application

1. Treaty as a whole

Draft model clause 7

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply this Treaty shall be bound to observe all the provisions thereof as agreed with the States [international organizations] concerned.

2. Only a part of a treaty

Draft model clause 8

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply articles […] of this Treaty shall be bound to observe the provisions thereof as agreed with the States [international organizations] concerned.

10. At its … meeting, on … 2018, the Commission decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft guidelines (see section C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session

1. Text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties

11. The text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, at its seventieth session is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6
Legal effect of provisional application

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied mutatis mutandis, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 9
Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, mutatis mutandis, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Guideline 10
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the

provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

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Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter VII
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Addendum

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C. Text of the draft Guide to Provisional Application of Treaties adopted by the Commission at its seventieth session .....

2. Text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties and commentaries thereto .....

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C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission at its seventieth session

2. Text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties and commentaries thereto

1. The text of the draft guidelines constituting the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, at its seventieth session, together with commentaries thereto, is reproduced below.

Guide to Provisional Application of Treaties

General commentary

(1) The purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties.[1] They may encounter difficulties concerning, *inter alia*, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules and/or to the solutions that seem most appropriate for contemporary practice.

(2) Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force.[2] Its purpose is to allow States and international organizations to give legal effect to a treaty or a part of a treaty by applying its provisions, in view of the necessity created by certain acts, events or situations, before it has entered into force.[3] The concept has been defined as "the application of and binding adherence to a treaty's terms before its entry into force"[4] and as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time".[5] Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust,[6] among other objectives.[7] More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes an essentially voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

(3) The Guide to Provisional Application of Treaties consists of draft guidelines that have been adopted by the Commission and are reproduced below, accompanied by commentaries. Although they are not legally binding as such, the draft guidelines reflect existing rules of international law. The draft guidelines are mainly based on article 25 of both the Vienna Convention on the Law of Treaties of 1969 (the "1969 Vienna

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[1] As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

[2] See D. Mathy, "Article 25", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 640.

[3] See A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012).

[4] R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1.

[5] See M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354.

[6] See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

[7] See A/CN.4/664, paras. 25–35.

Convention")[8] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (the "1986 Vienna Convention"),[9] which they try to clarify and explain, and on the practice of States and international organizations on the matter, without prejudice to other rules of international law.

(4) It is of course impossible to address all the questions that may arise in practice and cover the myriad of situations that may be faced by States and international organizations. Yet, that is consistent with one of the main aims of the present draft guidelines, which is to keep the flexible nature of the provisional application of treaties[10] and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide allows States and international organizations to set aside, by mutual agreement, the solutions identified in certain draft guidelines if they so decide.

(5) The Guide should also help to promote the consistent use of terms and therefore avoid confusion. The extensive use of terms,[11] such as "provisional entry into force" as opposed to "definite entry into force", has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties. In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[12] Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while it constitutes the legal basis of the matter,[13] has been criticized as difficult to understand[14] and lacking legal precision.[15] The intention of the present draft guidelines is to provide greater clarity in that regard.

(6) To provide assistance to States and international organization in their practice on provisional application, this Guide will also include draft model clauses, which are to be reproduced in an annex.[16] Those draft model clauses reflect best practices with regard to the provisional application of both bilateral and multilateral treaties. They are in no way intended to limit the flexible voluntary nature of provisional application of treaties, and they do not pretend to address the whole range of situations that may arise.

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[8] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[9] A/CONF.129/15 (not yet in force).

[10] See A/CN.4/664, paras. 28–30.

[11] In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975–2010* (Abuja, Ministry of Foreign Affairs of Nigeria), 2011, which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see A/CN.4/699, paras. 168–174).

[12] See paragraph 33 of the letter from the Federal Republic of Yugoslavia in the Exchange of Letters Constituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (*ibid.*, vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (A/CN.4/658 and A/CN.4/676), and the memorandum by the Secretariat on the practice of States and international organizations in respect of treaties that provide for provisional application (A/CN.4/707).

[13] See Mertsch, *Provisionally Applied Treaties* ... (see footnote 3 above), p. 22.

[14] See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111.

[15] See M.A. Rogoff and B.E. Gauditz, "The provisional application of international agreements", *Maine Law Review*, vol. 39 (1987), No. 1, p. 41.

[16] The Commission was not able to conclude its consideration of draft model clauses because of a lack of time. It therefore intends resuming such consideration at its seventy-first session, to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during its seventy-second session.

(7) A selected bibliography is attached to these commentaries.*

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the draft guidelines. In establishing the intended parameters of the draft guidelines, the provision should be read together with draft guideline 2, which sets out the purpose of the draft guidelines.

(2) The word "concern" was considered more suitable for a text aimed at providing guidance to States and international organizations than other formulations, such as "applies to", which is more frequently found in texts laying down rules applicable to States and other subjects of international law.

(3) The Commission decided not to include a further qualification limiting the scope *ratione personae* of the draft guidelines to States. Instead, the draft guidelines also pertain to international organizations, as is evident from the references to both States and international organizations in draft guidelines 5, 6, 7, 9, 10,[17] 11 and 12. That accords with the fact that the provisional application of treaties is envisaged in article 25 of both the 1969[18] and the 1986 Vienna Conventions.[19]

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Commentary

(1) Draft guideline 2 concerns the purpose of the draft guidelines and follows the practice of the Commission of including such types of provisions in its texts with a view to clarifying the purpose of the text in question. In the present case, the purpose of the draft

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* Forthcoming.

[17] The question of the potential role to be played by an international organization or an international conference in an agreement to provisionally apply a treaty or a part of a treaty is addressed in draft guideline 4.

[18] Article 25 of the 1969 Vienna Convention reads as follows:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[19] Article 25 of the 1986 Vienna Convention reads as follows:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
   (a) the treaty itself so provides; or
   (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

guidelines is to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) Draft guideline 2 is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the draft guidelines, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties. That is suggested by the decision to include a reference to both "the law and practice" on the provisional application of treaties. Such an approach is also alluded to in the reference to "other rules of international law", which reflects the understanding within the Commission that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the draft guidelines recognize the central importance of article 25 of the 1969 and the 1986 Vienna Conventions. The reference to "on the basis of", and the express reference to article 25, is intended to indicate that this article serves as the basic point of departure of the draft guidelines, even if it is to be supplemented by other rules of international law in order to obtain a full appreciation of the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. In so doing, the Commission deliberately sought to follow the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the draft guidelines is article 25. That is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not necessarily reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be provisionally applied. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions, while it uses the word "may" to underline the optional character of provisional application. The Commission also considered how to best capture in the text the States or international organizations that could provisionally apply a treaty, and the States or international organizations whose agreement is required in order for such provisional application to take place, and therefore retained a more general formulation.

(3) Unlike in article 25, which alludes, in paragraph 1 (*b*), to an agreement to provisionally apply a treaty existing among "negotiating States" or "negotiating States and negotiating organizations", no reference is made in draft guideline 3 to which States or international organizations may provisionally apply a treaty. In the process of considering whether to align the present formulation with that found in article 25, by qualifying the applicability of the general rule to a particular group of States or international organizations, the Commission acknowledged the possibility, arising from contemporary practice, that provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question. The question as to whether the term "negotiating States" in article 25, paragraph 1 (*b*), would prevent non-negotiating States or non-negotiating international organizations

from entering into an agreement on provisional application could not be clearly answered based on the multilateral treaties taken into consideration.[20] Furthermore, the need to distinguish between different groups of States or international organizations, in terms of their connection with the treaty, was considered less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that historically have been provisionally applied. However, relevant practice was identified by examining certain commodity agreements that had never entered into force but were extended beyond their termination date.[21] In such cases, when States extended an agreement that had only been provisionally applied, such an extension was also understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement.

(4) The distinction between provisional application of the entire treaty, as opposed to a "part" thereof, originates in article 25. The Commission, in its work on the law of treaties, specifically envisaged the possibility of what became known as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the "same rule" on what it then termed "provisional entry into force" applied to "part of a treaty".[22] In the corresponding commentary, it was explained that: "[n]o less frequent to-day is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation".[23] The Commission remains of the same view. The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms, that may be less amenable to provisional application. The provisional application of a part of a treaty is accordingly reflected in the formula "provisional application of a treaty or a part of a treaty", which is used throughout the draft guidelines.[24]

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[20] See A/CN.4/707, para. 37.

[21] See, for example, the International Tropical Timber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30–37.

[22] *Yearbook ... 1966*, vol. II, para. 38.

[23] Paragraph (3) of the commentary to draft article 22, *ibid.*

[24] An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (*ibid.*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part of a treaty from provisional application can be found in the Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); Convention on Cluster Munitions, (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); Arms Trade Treaty (A/CONF.217/2013/L.3, art. 23); and the Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe (ILM, vol. 36, p. 866, sect. VI, para. 1). Similarly, the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the Trans-Pacific Strategic Economic Partnership Agreement (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement.

(5) The second phrase, namely "pending its entry into force between the States or international organizations concerned", is based on the chapeau of article 25. The Commission considered the possible ambiguity in the reference to "entry into force". While the expression could be referring, on the one hand, to the entry into force of a treaty itself,[25] examples exist of provisional application continuing for some States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations, as is the case for treaties in the multilateral context.[26] The reference to "entry into force" in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned. The reference at the outset to "pending its entry into force" is also meant to underscore the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives.

(6) The third and fourth phrases ("if the treaty so provides, or if in some other manner it has been so agreed") reflect the two possible bases for provisional application recognized in paragraph 1 (*a*) and (*b*) of article 25. The possibility of provisional application on the basis of a provision in the treaty in question is well established,[27] and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

(7) A modified, more general formulation was adopted for the alternative scenario of provisional application on the basis of a separate agreement. Unlike the 1969 and 1986 Vienna Conventions, no specific mention is made of a particular group of States or international organizations, acknowledging the contemporary practice that has included cases of provisional application being agreed to either by only some negotiating States or by non-negotiating States that subsequently signed or acceded to the treaty. Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely unconnected to the treaty, provisionally applying it after having agreed in some other manner with one or more negotiating States or international organizations. That explains the more neutral drafting of draft guideline 3, in the passive form, which simply restates the basic rule.

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[25] As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid.*, vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force.

[26] For example, the Arms Trade Treaty.

[27] Examples in the bilateral sphere include: Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports (United Nations, *Treaty Series*, [vol. not published yet], No. 51407), art. 8; Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste (*ibid.*, [vol. not published yet], No. 50313), art. 13; Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7; Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13–14), art. 18, para. 7, and its corresponding Protocol on Claims, Legal Proceedings and Indemnification (*ibid.*, p. 35), art. 4, para. 8; Statutes of the Community of Portuguese-Speaking Countries (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and Agreement establishing the "Karanta" Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

(8) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby expanding on the meaning of agreement "in some other manner".

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with additional forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might expressly permit provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) As previously indicated, draft guideline 4 elaborates on the reference to "in some other manner it has been so agreed" at the end of draft guideline 3, which is expressly envisaged in article 25, paragraph 1 (*b*). That is confirmed by the opening phrase "[i]n addition to the case where the treaty so provides", which is a direct reference to the phrase "if the treaty itself so provides" in draft guideline 3. That follows the language of article 25. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(3) Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the treaty that is provisionally applied.[28]

(4) Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application.[29] By way of providing further guidance, reference is made

[28] Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany (*ibid.*, [vol. not yet published], No. 49430) and the Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar (*ibid.*, vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (*ibid.*, [vol. not yet published], No. 51181); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas; and the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force).

[29] In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (United Nations, *Treaty Series*, [vol. not yet published], No. 51578); Agreement between the Government of Latvia and the Government of the

to two examples of such "means or arrangements", namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.[30] It is of course understood that any such resolution or declaration has to be consistent with the rules of the international organization or the intergovernmental conference concerned.

Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (*ibid.*, vol. 2461, No. 44230, p. 205); and Agreement between the United Nations and the Government of the Republic of Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, "The provisional application of treaties", in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nijhoff, 1998), p. 81.

[30] These are not agreements in which the international organization is a party to the treaty as such. Rather, these are agreements between States reached in meetings or conferences under the auspices of that international organization. Several such instances can be given. First, the amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement (United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105). See D. Sagar, "Provisional application in an international organization", *Journal of Space Law*, vol. 27, No. 2 (1999), pp. 99-116. Second, there are a number of precedents in which the competent organs of international organizations provisionally applied amendments, without explicit power being provided for in their constitutions, namely the Congress of the Universal Postal Union, the Committee of Ministers of the Council of Europe, and the practice of the International Telecommunication Union. See Sagar, "Provisional application in an international organization", pp. 104–106. Third, the amendment adopted in 2012 by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162), in which the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap in the operation of the clean development mechanism that might arise in relation to the entry into force of amendments to the Kyoto Protocol, recommended that those amendments could be provisionally applied. See "Legal considerations relating to a possible gap between the first and subsequent commitment periods" (FCCC/KP/AWG/2010/10), para. 18. Fourth, the Amendment to Article 14 of the Statutes of the World Tourism Organization (United Nations, *Treaty Series*, [vol. not published yet], No. 14403). Other examples, where Governments are given the possibility to bring the agreement provisionally into force by virtue of a collective decision, include: (a) International Agreement on Olive Oil and Table Olives (*ibid.*, vol. 2684, No. 47662, p. 63); (b) International Tropical Timber Agreement; (c) International Cocoa Agreement, 1993 (*ibid.*, vol. 1766, No. 30692, p. 3); and (d) International Cocoa Agreement, 2010 (*ibid.*, vol. 2871, No. 50115, p. 3). Lastly, a case that two academic sources qualify as one of provisional application refers to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test Ban Treaty Organization, which was done through the adoption of a resolution by the Meeting of States Signatories (CTBT/MSS/RES/1) on 19 November 1996. Although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect, these scholars argue that because the decisions of the Preparatory Commission are intended to implement core provisions of the Comprehensive Nuclear-Test Ban Treaty before its entry into force, the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement "in some other manner", or of an "implied provisional application" on the basis of article 25, 1 (b) of the 1969 Vienna Convention. See A. Michie," The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol.10, (2005), pp. 347–377, at pp. 369–370. See also, Y. Fukui, "CTBT: Legal questions arising from its non-entry into force revisited", *Journal of Conflict and Security Law* (forthcoming) pp. 1–18, at pp. 13–15. By contrast, another source, published under the auspices of the United Nations Institute for Disarmament Research and containing a preface by the Executive Secretary of the Preparatory Commission, maintains that the Comprehensive Nuclear-Test Ban Treaty is not currently being provisionally applied. See R. Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, UNIDIR/2009/2 (2009), pp. 227–231.

(5) While the practice is still quite exceptional,[31] the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Commentary

(1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

(2) The first clause reflects the approach taken in the draft guidelines of referring to the provisional application of the entire treaty or a part of a treaty.

(3) The second clause has two components. The reference to "pending its entry into force" follows the formulation found in draft guideline 3, whereby "entry into force" refers to the entry into force between the States or international organizations concerned. As indicated in the commentary to draft guideline 3, such considerations are pertinent primarily in the context of the provisional application of multilateral treaties. The Commission decided to retain the general reference to "entry into force", as already indicated in the commentary to draft guideline 3.[32]

(4) The second component is the inclusion of the reference to both States and international organizations. That reflects the position taken by the Commission, referred to in paragraph (3) of the commentary to draft guideline 1, whereby the scope of the draft guidelines should include treaties between States and international organizations or between international organizations. The reference to entry into force "between" the States or international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force.

(5) The phrase "takes effect on such date, and in accordance with such conditions and procedures" concerns the triggering of the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which refers to "takes effect". The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally.

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[31] See the second report by the Special Rapporteur (A/CN.4/675), paras. 35 (c) and 36–41, and the third report by the Special Rapporteur (A/CN.4/687), paras. 5 and 120, on the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (*United Nations Treaty Series, vol. 1974, No. 33757)*. See also the Protocol to the Agreement on a Unified Patent Court on Provisional Application (www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).

[32] See paragraph (5) of the commentary to draft guideline 3.

The Commission decided not to refer expressly to the various modes of expressing consent to be bound by a treaty, in order to retain a more streamlined provision.

(6) The concluding phrase "as the treaty provides or as are otherwise agreed" confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments.

Guideline 6
Legal effect of provisional application

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Commentary

(1) Draft guideline 6 deals with the legal effect of provisional application. Two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being provisionally applied. Without excluding the legal effect of the agreement to provisionally apply a treaty or a part thereof, draft guideline 6 relates to the legal effect of a treaty or a part of a treaty that is provisionally applied.

(2) The draft guideline begins by stating that the legal effect of provisional application of a treaty or a part of a treaty is to produce a legally binding obligation to apply the treaty or part thereof as if the treaty were in force between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced. Such legal effect is derived from the agreement to provisionally apply the treaty by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effect of provisional application, which is common, the draft guideline provides that the provisional application produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force.[33]

(3) The previous position is qualified by the concluding phrase "unless the treaty provides otherwise or it is otherwise agreed", which confirms that the basic rule is subject to the treaty, which may provide an alternative legal outcome. Such an understanding, namely a default in favour of the creation of a legally binding obligation to apply the treaty as if it were in force, subject to the possibility that the parties may agree otherwise, is reflected in existing State practice.[34]

(4) The opening phrase "the provisional application of a treaty or a part of a treaty" follows draft guideline 5. The phrase "a legally binding obligation to apply the treaty or part thereof as if the treaty were in force", which is central to the draft guideline, alludes to the effect that the treaty would produce were it in force for the State or the international organization concerned and to the conduct that is expected from States or international

[33] See Mathy, "Article 25" (footnote 2 above), p. 651.

[34] See the treaties analysed in the Memorandum by the Secretariat (A/CN.4/707), which contains an analysis of more than 400 bilateral and 40 multilateral treaties, while recognizing that in reality the number of both bilateral and multilateral treaties provisionally applied is higher than the number available in the United Nations *Treaty Series*; See also the examples contained in the reports submitted by the Special Rapporteur: A/CN.4/664, A/CN.4/675, A/CN.4/687 and A/CN.4/699 and Add.1. The latter contains an annex with examples of recent European Union practice on provisional application of agreements with third States. See also the examples of the practice of the European Free Trade Association (EFTA) referred to in the fifth report by the Special Rapporteur (A/CN.4/718).

organizations that decide to resort to provisional application. The reference to "between the States or international organizations concerned" was inserted in order to align the draft guideline with draft guideline 5. The concluding clause, "unless the treaty provides otherwise or it is otherwise agreed", indicates the condition on which the general rule is based, namely that the treaty does not provide otherwise.

(5) Nonetheless, an important distinction must be made. As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application "produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force" does not imply that provisional application has the same legal effect as entry into force. The reference to a "a legally binding obligation" is intended to add more precision in the depiction of the legal effect of provisional application.

(6) The Commission considered the possibility of introducing an express safeguard so that the provisional application of a treaty could not result in the modification of the content of the treaty. However, the formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal with the point, since provisional application is limited to producing a legally binding obligation to apply the treaty or part thereof as if the treaty were in force. Implicit in the draft guideline, therefore, is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.[35] Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is provisionally applied, in accordance with part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Commentary

(1) Draft guideline 7 deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty.

(2) Owing to the relative lack of practice on the matter and the fact that reservations in the case of provisional application were not addressed in the 2011 Guide to Practice on Reservations to Treaties,[36] the Commission is only at the initial stage of considering the question of reservations in relation to the provisional application of treaties. Different and quite divergent views were expressed in the Commission as to whether it was appropriate or necessary to include a provision on reservations in the context of provisional application of a treaty or a part thereof in the Guide, although it was generally believed that, as a matter

[35] However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. VI.

[36] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1).

of principle, nothing prohibits the possibility of formulating reservations related to provisional application.

(3) Although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations must be distinguished from reservations.[37] Nor do declarations to opt out of provisional application constitute reservations in the sense of the law of treaties.[38]

(4) Paragraph 1 begins with the phrase "[i]n accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*". This phrase is meant to invite further examination and discussion of the rules of the 1969 Vienna Convention applicable to reservations in case of provisional application. The phrase was placed at the beginning of the paragraph to clearly indicate that the relevant rules of the Vienna Convention being referred to are those that qualify the formulation of reservations, and not those that relate to the provisional application of certain provisions of the respective treaty.

(5) The phrase "a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty" is based on articles 2, paragraph 1 (d), and 19 of the Vienna Convention. The reference to the legal effect "produced by the provisional application" underlines the intrinsic link between draft guideline 6 and draft guideline 7. The formulation is considered to be relatively neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such.

(6) Paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1. Paragraph 2 replicates paragraph 1, with the necessary modifications. The opening phrase "[i]n accordance with the relevant rules of international law", is to be understood broadly to include primarily the rules of the law of treaties, but also those pertaining to the law of the international responsibility of international organizations.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Commentary

(1) Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being provisionally applied. It reflects the legal implication of the application of draft guideline 6. If the treaty or a part of a treaty being provisionally applied is considered as being legally binding, then a breach of an obligation arising under the treaty or a part of a treaty being provisionally applied would necessarily constitute a wrongful act giving rise to international responsibility. The Commission considered whether it was necessary to have a provision on responsibility at all. The inclusion of the present draft guideline was deemed necessary since it dealt with a key legal consequence of the provisional application of a treaty or a part of a treaty. Since article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly, the prevailing view was that the scope of the draft guidelines was not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

[37] See, in particular, guideline 1.3 of the Guide to Practice on Reservations to Treaties (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1)).

[38] See *e.g.* art. 45, para. 2 (a) of the Energy Charter Treaty (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95); and art. 7, para. 1 (a), of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

(2) The Commission decided to retain the reference to "a part" of a treaty in order to specify that when a part of a treaty is being provisionally applied, it is only that part that is susceptible to giving rise to international responsibility in case of a breach, as conceived under the present draft guideline.

(3) The draft guideline was aligned with the articles on responsibility of States for internationally wrongful acts of 2001 [39] and with the articles on responsibility of international organizations of 2011,[40] to the extent that they reflect customary international law. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from those draft articles. Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to those draft articles.

Guideline 9
Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Commentary

(1) Draft guideline 9 concerns the termination and suspension of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, when the treaty enters into force for the State or international organization concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being provisionally applied. The possibility that other, less common, means of terminating provisional application is not excluded.

(2) Paragraph 1 addresses termination of provisional application upon entry into force. Entry into force is the most frequent way in which provisional application is terminated.[41] That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty itself is implicit in the reference in draft guidelines 3 and 5 to "pending its entry into force", which is based on article 25 of the 1969 and 1986 Vienna Conventions.[42] In accordance with draft guideline 5, provisional application

[39] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

[40] *Yearbook ... 2011*, vol. II (Part Two), para. 87.

[41] See A/CN.4/707, para. 88.

[42] Most bilateral treaties state that the treaty shall be provisionally applied "pending its entry into force", "pending its ratification", "pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Governments ... informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article" or "until its entry into force" (see A/CN.4/707, para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force), which provides in paragraph (*d*) that: "Such a declaration [of provisional application] will cease to be

continues until the treaty enters into force for the State or international organization provisionally applying the treaty or a part of a treaty in relation to the other States or international organizations provisionally applying it or a part of it as well.[43]

(3) The phrase "in the relations between the States or international organizations concerned" was included to distinguish the objective entry into force of the treaty from the subjective entry into force for one or more parties to the treaty. This was viewed as being particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continue to be applied only provisionally by others. This phrase is thus intended to capture all the possible legal situations that may exist in the regard.

(4) Paragraph 2 reflects the second instance mentioned in paragraph (1) of the commentary to the present draft guideline, namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions.

(5) The opening phrase of paragraph 2 "[u]nless the treaty otherwise provides or it is otherwise agreed" omits the reference to such an alternative agreement only being concluded between the "negotiating" States and international organizations, which can be found in the 1969 and 1986 Vienna Conventions. The formulation "or it is otherwise agreed" continues to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty. Given the complexity of concluding modern multilateral treaties, it was not clear to the Commission that contemporary practice continued to support the narrow language of the Vienna Conventions, both in terms of whether all negotiating States or international organizations were to be treated as being on the same legal footing in relation to provisional application and out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.[44]

(6) The Commission was also concerned with identifying which States or international organizations should be notified of another's intention to terminate the provisional application of a treaty or a part of a treaty. The final phrase in the draft guideline, "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally", clarifies that point.[45]

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effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned."

[43] See, e.g., the Agreement between the Federal Republic of Germany and the Government of the Republic of Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products Stored in Germany on its Behalf (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333–334).

[44] Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraphs (2) and (5) of the commentary to draft guideline 3, above.

[45] A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (*ibid.*, [vol. not yet published], No. 51490, p. 14), art. 17. Other examples include: Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, at p. 173); Agreement between Spain and the International Oil Pollution Compensation Fund (*ibid.*, vol. 2161, No. 37756, p. 45, at p. 50); and Treaty between the Kingdom of Spain and the North Atlantic Treaty Organization Represented by the Supreme Headquarters Allied

(7) The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

(8) Paragraph 3 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension. Despite an apparent lack of relevant practice and notwithstanding the fact that article 25, paragraph 2, of the Vienna Convention provides a flexible way to terminate provisional application, the Commission considered it useful to include a provision covering termination and suspension in the case of a material breach in the Guide to address a number of possible scenarios not covered by paragraphs 1 and 2. For example, a State or international organization may only wish to terminate provisional application, but still intend to become a party to the treaty. Another conceivable scenario is that in which a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied.

(9) The formulation of paragraph 3 as a "without prejudice" clause is intended to preserve the possibility that not only article 60 but also other provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied. Instead, the rules of the Vienna Convention are to be "applied *mutatis mutandis*" depending on the circumstances.

(10) The reference to "or other relevant rules of international law" is primarily intended to extend the scope of the provision to the provisional application of treaties by international organizations. It acknowledges that the 1986 Vienna Convention has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart. The reference also makes clear that the provision is without prejudice to other methods of terminating provisional application more generally.[46]

(11) The scope of the provision is limited to section 3 of part V of the 1969 Vienna Convention to avoid any legal uncertainty that might have resulted from a general reference to part V. The Commission recognized that other provisions of part V, in particular the procedural provisions in section 4, are not applicable to States not parties to the 1969 Vienna Convention. Similarly, the specific reference to section 3 serves to exclude the

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Powers Europe on the Special Conditions Applicable to the Establishment and Operation on Spanish Territory of International Military Headquarters (*ibid.*, vol. 2156, No. 37662, p. 139, at p. 155). As for the termination of multilateral treaties, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (*ibid.*, vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with the International Agreement on Olive Oil and Table Olives.

[46] See, for example, art. 29 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (*ibid.*, vol. 1946, No. 33356, p. 3), which envisages additional means of terminating provisional application of multilateral treaties that are in force with respect to the territory to which the succession of States relates.

applicability of section 2 of part V of the Vienna Convention, on invalidity. The Commission considered invalidity in draft guideline 11.

Guideline 10
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Commentary

(1) Draft guideline 10 deals with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969[47] and 1986[48] Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27,[49] draft guideline 10 states that the provisional application of a treaty by a State or international organization cannot, as a general rule, depend on, or be conditioned by, their internal law or rules. Whatever the provisions of the internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[50] However, as indicated in draft guideline 12, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

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[47] Art. 27 of the 1969 Vienna Convention provides as follows:

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[48] Art. 27 of the 1986 Vienna Convention provides as follows:

Internal law of states, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

[49] See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 688–701, at p. 689.

[50] See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 43).

(4) While it is true that each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,[51] once a treaty or a part of a treaty is provisionally applied, an inconsistency with the internal law of a State or of the rules of an international organization cannot justify a failure to provisionally apply such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to provisionally apply a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization.[52] Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.[53]

(6) The reference in the draft guideline to the "internal law of States and rules of international organizations" stands for any provision of this nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase "obligation arising under such provisional application", in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to provisionally apply the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces the same legal effect as if the treaty were in force between the States and the international organization concerned.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 11 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 11 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,[54] and the second, paragraph 2 of

[51] See Mertsch, *Provisionally Applied Treaties* ... (see footnote 3 above), p. 64.

[52] See Mathy, "Article 25", (footnote 2 above), p. 646.

[53] See article 3 of the draft articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and draft article 5 of the draft articles on responsibility of international organizations of 2011 (*Yearbook ... 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

[54] Article 46 of the 1969 Vienna Convention provides as follows:

article 46 of the 1986 Vienna Convention.[55] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

(3) Draft guideline 11 states that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation of that type is "manifest" if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.[56]

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

Commentary

(1) Draft guideline 12 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. It acknowledges that such limitations may exist and, consequently, recognizes the right of States and international organizations to agree to provisional application subject to limitations that derive from internal law or rules of the organizations, and reflecting them in their consent to provisionally apply a treaty or a part of a treaty.

(2) Notwithstanding the fact that the provisional application of a treaty or part of a treaty may be subject to limitations, such as obtaining parliamentary consent, the present draft guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their

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Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[55] Article 46 of the 1986 Vienna Convention provides as follows:

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

[56] According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization or even make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.[57]

(3) The word "agreement" in the title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or the rules of the international organization concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to provisionally apply a treaty or a part of a treaty.

(5) The present draft guideline should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization.

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[57] See, for example, art. 45 of the Energy Charter Treaty. See also the several examples of Free Trade Agreements between the EFTA States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: "if its constitutional requirements permit", "if its respective legal requirements permit" or "if their domestic requirements permit" (http://www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom Union States, reads as follows:

> Article 43 (Entry into force)
>
> [...]
>
> 2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depository.
>
> [...]

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Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter VIII
Peremptory norms of general international law (*jus cogens*)

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A. Introduction

1. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as Special Rapporteur for the topic.[1] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

2. At its sixty-eighth session (2016) and sixty-ninth session (2017), the Commission considered the first and second reports of the Special Rapporteur,[2] respectively.

3. At its sixty-ninth session, following a proposal by the Special Rapporteur in his second report,[3] the Commission decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".[4]

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/714 and Corr.1), which considered the consequences and legal effects of peremptory norms of general international (*jus cogens*). On the basis of his analysis, the Special Rapporteur proposed thirteen draft conclusions.[5]

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[1] At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 23).

[2] A/CN.4/693 and A/CN.4/706.

[3] A/CN.4/706, para. 90.

[4] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 146).

[5] The text of draft conclusions 10 to 23, as proposed by the Special Rapporteur in his third report, reads as follows:

Draft conclusion 10
Invalidity of a treaty in conflict with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). Such a treaty does not create any rights or obligations.

2. An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty.

3. To avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 11
Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)

1. A treaty which, at its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid in whole, and no part of the treaty may be severed or separated.

2. A treaty which becomes invalid due to the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regards to their application;

(b) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) do not constitute an essential basis of the consent to the treaty; and

(c) continued performance of the remainder of the treaty would not be unjust.

Draft conclusion 12
Elimination of consequences of acts performed in reliance of invalid treaty

1. Parties to a treaty which is invalid as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to eliminate the consequences of any act performed in reliance of the provision of the treaty which is in conflict with a peremptory norm of general international law *(jus cogens)*.

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty unless such a right, obligation or legal situation is itself in conflict with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 13
Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Draft conclusion 14
Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)

1. Subject to the jurisdictional rules of the International Court of Justice, any dispute concerning whether a treaty conflicts with a peremptory norm of general international law (*jus cogens*) should be submitted to the International Court of Justice for a decision, unless the parties to the dispute agree to submit the dispute to arbitration.

2. Notwithstanding paragraph 1, the fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is not sufficient to establish the jurisdiction of the Court without the necessary consent to jurisdiction in accordance with international law.

Draft conclusion 15
Consequences of peremptory norms of general international law (*jus cogens*) for customary international law

1. A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*).

2. A customary international law rule not of *jus cogens* character ceases to exist if a new conflicting peremptory norm of general international law (*jus cogens*) arises.

3. Since peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector rule is not applicable.

Draft conclusion 16
Consequences of peremptory norms of general international law (*jus cogens*) on unilateral acts

A unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid.

Draft conclusion 17
Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations

1. Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*).

2. To the extent possible, resolutions of international organizations, including those of the Security Council of the United Nations, must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*).

Draft conclusion 18
The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*

Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States.

5. The Commission considered the third report at its 3414th to 3421st, and 3425th meetings, on 30 May and 1 June 2018, and from 2 to 4 and 9 July 2018.

6. At its 3425th meeting, on 9 July 2018, the Commission referred draft conclusions 10 to 23,[6] as contained in the Special Rapporteur's third report, to the Drafting Committee.

7. At its 3402nd meeting, on 14 May 2018, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on "Peremptory norms of general international law (*jus cogens*)", concerning draft conclusions 8 and 9 that it had provisionally adopted at the seventieth session. At its 3434th meeting, on 20 July 2018, the Chairperson of the Drafting Committee presented a further interim report of the Drafting Committee, concerning draft conclusions 10 to 14 that it had provisionally adopted at the seventieth session. Both reports were presented for information only, and are available on the website of the Commission.[7]

1. Introduction by the Special Rapporteur of the third report

8. In providing a review of the debate in the Sixth Committee, the Special Rapporteur recalled that, while States had generally agreed with the criteria for the identification of

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Draft conclusion 19
Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness

1. No circumstance may be advanced to preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. Paragraph 1 does not apply where a peremptory norm of general international law (*jus cogens*) emerges subsequent to the commission of an act.

Draft conclusion 20
Duty to cooperate

1. States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*).

2. A serious breach of a peremptory norm of general international law (*jus cogens*) refers to a breach that is either gross or systematic.

3. The cooperation envisioned in this draft conclusion can be carried out through institutionalized cooperation mechanisms or through ad hoc cooperative arrangements.

Draft conclusion 21
Duty not to recognize or render assistance

1. States have a duty not to recognize as lawful a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

2. States shall not render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

Draft conclusion 22
Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law (*jus cogens*)

1. States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), where the offences are committed by the nationals of that State or on the territory under its jurisdiction.

2. Paragraph 1 does not preclude the establishment of jurisdiction on any other ground as permitted under its national law.

Draft conclusion 23
Irrelevance of official position and non-applicability of immunity *ratione materiae*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.

2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

[6] *Idem*.
[7] http://legal.un.org/ilc.

norms of *jus cogens* provisionally adopted by the Drafting Committee, a few had recommended the inclusion of additional elements, such as non-derogation, fundamental values of the international community, and practice. He noted the call for greater clarity concerning the concept of "acceptance and recognition". While many States had agreed that there should be a "a very large majority" of States accepting and recognizing the peremptory character of a norm, some preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States. He also recalled the divergence in views concerning the sources of law that could form the basis of a peremptory norm, but noted that there was near-universal agreement that customary international law was a source.

9. The Special Rapporteur then introduced his proposed draft conclusions contained in section IV of the third report. He noted that draft conclusions 10, 11 and 12 were based on provisions of the Vienna Convention on the Law of Treaties of 1969 ("1969 Vienna Convention"), except for paragraph 3 of draft conclusion 10, providing for a treaty to be interpreted in a manner consistent with *jus cogens*, which he considered being a necessary consequence of article 31, paragraph 3 (c), of the Convention requiring the relevant rules of international law to be taken into account in the interpretation of treaties. Moreover, he noted that there was a significant amount of practice in support of the content of paragraph 3 of draft conclusion 10.

10. Draft conclusion 13 concerning the effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties was based principally on the guideline 4.4.3 of the Guide to Practice on Reservations to Treaties,[8] adopted by the Commission in 2011.

11. Draft conclusion 14 contained a recommended procedure regarding settlement of disputes involving conflict between a treaty and a norm of *jus cogens*. The Special Rapporteur recalled the fundamental importance of article 66 of the 1969 Vienna Convention for the application of articles 53 and 64 thereof. Nonetheless, in his view it was difficult to incorporate the procedure therein into a set of non-binding draft conclusions. Instead, he considered that his proposal for draft conclusion 14 would, for cases in which article 66 of the 1969 Vienna Convention did not apply (e.g., because the States concerned were not parties to the Convention), serve as encouragement for parties to submit their disputes to judicial settlement, including by the International Court of Justice.

12. As regarded draft conclusion 15, the Special Rapporteur noted that paragraph 1 was based on a number of decisions of national courts in which *jus cogens* norms were held to prevail over the rules of customary international law. In his view, such findings necessarily implied that existing norms of *jus cogens* would invalidate or prevent customary international law rules from coming into being. The second paragraph of draft conclusion 15, concerning the conflict of a customary international law rule with a new *jus cogens* norm, was based on article 64 of the 1969 Vienna Convention, and had been supported by States and by judgments of the European Court of Justice. The Special Rapporteur further noted that paragraph 3, concerning the non-application of the persistent objector rule to *jus cogens* norms, was consistent with the universal nature of *jus cogens* and had been accepted in State practice, including in the decisions of national and regional courts.

13. With regard to draft conclusion 16, on the invalidity of a unilateral act in conflict with a norm of *jus cogens*, the Special Rapporteur noted that the use of the phrase "is invalid" tracked guiding principle 8 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,[9] adopted by the Commission in 2006.

14. Draft conclusion 17 concerned the binding resolutions of international organizations. The Special Rapporteur noted that the proposition, contained in the first paragraph, that binding resolutions of international organizations did not establish binding obligations if they conflicted with a norm of *jus cogens*, was supported by a significant amount of

[8] *Yearbook ... 2011*, vol. II (Part Two), para. 75.
[9] *Yearbook ... 2006*, vol. II (Part Two), para. 176.

literature and public statements by States maintaining that Security Council resolutions were subject to norms of *jus cogens*, as well as by decisions of domestic, regional and international courts. He also noted that, similar to paragraph 3 of draft conclusion 10, paragraph 2 of draft conclusion 17 contained an interpretative presumption indicating that, to the extent possible, resolutions of international organizations were to be interpreted in a manner consistent with norms of *jus cogens*. Such assertion found support in statements by States in various contexts and in the judgments of the European Court of Justice.

15. As regarded draft conclusion 18, the Special Rapporteur maintained that it was virtually universally accepted that *jus cogens* norms established *erga omnes* obligations.

16. Draft conclusions 19, 20 and 21 concerned aspects of international responsibility. Draft conclusion 19, drawn from draft article 26 of the articles on the responsibility of States for internationally wrongful acts,[10] adopted in 2001 (hereinafter, "articles on State responsibility"), confirmed in paragraph 1 that the circumstances precluding wrongfulness under general international law did not apply to breaches of obligations arising from *jus cogens* norms. The second paragraph sought to prevent responsibility arising retroactively where a norm of *jus cogens* emerged subsequent to the commission of an act in breach of that norm.

17. Draft conclusion 20 concerning the duty to cooperate to bring to an end through lawful means any serious breach of a *jus cogens* norm. The first paragraph was based on paragraph 1 of draft article 41 of the articles on State responsibility. The duty to cooperate was a well-established principle of international law. It had been codified by the Commission in the draft articles on the protection of persons in the event of disasters,[11] adopted in 2016, and had found support in the *Wall* advisory opinion of the International Court of Justice[12] and the *La Cantuta* case[13] in the Inter-American Court of Human Rights.

18. Draft conclusion 21, providing for a duty not to recognize as lawful a situation created by a breach of a *jus cogens* norm and not to give aid or assistance in the maintenance of such a situation, was based on paragraph 2 of draft article 41 of the articles on State responsibility. The Commission, in 2001, had recognized that the duty enjoyed a customary international law status, as confirmed by the International Court, in the *Legal Consequences for States* [14] and the *Wall* opinions, as well as in resolutions of the Security Council and the General Assembly. He also pointed out that, differing from draft conclusion 20, draft conclusion 21 was not limited to "serious" breaches, since the duty of non-recognition or non-assistance was based on the peremptoriness of the norm and not the seriousness of its breach. He noted, in that regard, that neither the *Legal Consequences for States* or *Wall* opinions, had specified the seriousness as a threshold in the case of the duty not to recognize or give assistance. Moreover, since that duty, unlike the duty to cooperate, did not require positive conduct, and was thus less onerous a duty, the lowered threshold was justified.

19. Draft conclusion 22, on the establishment of jurisdiction over crimes prohibited by norms of *jus cogens*, was based on draft article 7 of the draft articles on crimes against humanity,[15] adopted by the Commission on first reading in 2017, albeit in a more simplified

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[10] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76.

[11] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 48.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 200, para. 159.

[13] *La Cantuta v. Perú (Merits, Reparations and Costs)*, Series C, No. 162, Judgment, 29 November 2006, Inter-American Court of Human Rights, para. 160 ("[a]s pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (*jus cogens*) ... In view of the nature and seriousness of the events ... the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states").

[14] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 119.

[15] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 45.

formulation. Paragraph 2 adopted the same approach to the question of universal jurisdiction as had been done in paragraph 3 of draft article 7, given the prevailing uncertainty in State practice.

20. Draft conclusion 23 concerned the irrelevance of official position and the non-applicability of immunity *ratione materiae*. Paragraph 1, establishing that a person's official capacity did not constitute a ground excluding responsibility, was inspired by draft article 6, paragraph 3, of the draft articles on crimes against humanity adopted on first reading in 2017, and was generally accepted as being part of customary international law. Paragraph 2, providing for the non-applicability of immunity *ratione materiae* in the case of offences prohibited by *jus cogens* norms, was based principally on draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction,[16] adopted provisionally by the Commission in 2017. Despite the criticism that draft provision had received, including that there existed State practice contradicting the exception, the Special Rapporteur pointed out that such contradictory practice was typically based on cases concerning civil proceedings and proceedings against States, which were not meant to serve as precedent for immunities in a criminal context, as suggested by several judicial decisions, including that of the International Court of Justice in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case.[17]

2. Summary of debate

(a) General comments

21. Members generally welcomed the third report on peremptory norms of general international law (*jus cogens*). Several members commended the Special Rapporteur for attempting to address all the possible consequences of *jus cogens*, beyond the law of treaties and that of State responsibility, the two main areas in which the Commission had previously made extensive codification efforts. It was noted that the consequences of *jus cogens*, for example, for international criminal law, customary international law and Security Council resolutions, presented important practical problems and generated debate in the academic literature, and that the divergent views in case law should not prevent the Commission from dealing with those issues.

22. Several members supported the Special Rapporteur's practical approach to the examination of the topic, as opposed to taking a doctrinal or excessively theoretical approach. The challenge posed by the lack of practice and the relative complexity of the political and moral elements involved was further pointed to. It was emphasized that the Commission should take a cautious approach and examine all aspects of the consequences of *jus cogens* in a balanced manner and on the basis of the existing law and established practice. It was noted that the characteristics of *jus cogens* were intertwined with the consequences of their breach and the two should be considered together. The concern was expressed that the Special Rapporteur was attaching legal significance to what were essentially descriptive elements, such as non-derogability, which was a criterion for identification of *jus cogens* norms, not a legal consequence thereof. It was suggested that a study of the negotiating history of articles 53, 64 and 66 (a) and other relevant provisions of the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 be undertaken.

23. Satisfaction was generally expressed with the fact that most of the draft conclusions proposed by the Special Rapporteur were based on relevant provisions of the 1969 Vienna Convention, and other instruments adopted by the Commission. The lack of a parallel structure in the draft conclusions dealing with the consequences of conflict with *jus cogens* for various sources of international law was, however, questioned. Some members would prefer that the same structure as that in articles 53 and 64 of the 1969 Vienna Convention

[16] *Ibid.*, para. 140.

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 130, para. 70 (national legislation), and p. 141, para. 96 (case law).

be applied to the consequences of *jus cogens* for sources of international law other than treaties. They further stressed the need to set out procedures for ascertaining the invalidity of a particular source of international law owing to conflict with *jus cogens*.

24. Several members agreed that the draft conclusions could be grouped into different parts according to their context and be organized in a coherent, concise and effective manner, closely following the structure of the existing instruments. The view was expressed that the Commission should reconsider the appropriateness of having draft "conclusions" as the outcome of its consideration of the topic.

25. It was noted that the Special Rapporteur had not proposed a draft conclusion relating to general principles of law, which implied that a general principle of law in conflict with a *jus cogens* norm may nevertheless be valid. Some members supported such non-inclusion on the ground that no conflict could possibly be conceived of in the case of general principles of law. The view was also expressed that the Commission should strive to bring new elements to the topic, beyond those of its previous work.

26. The view was expressed that, throughout the draft conclusions, the use of terms such as "consequences", "legal effects", "void", "invalid" and others should be consistent with the usage in existing instruments. It was suggested that the notion of "conflict" used in the draft conclusions should be clarified to provide guidance or criteria to States when deciding whether a treaty or act was, as a matter of law, in conflict with a norm of *jus cogens*.

(b) Specific comments on the draft conclusions

(i) Draft conclusion 10

27. Some members noted that the first sentence of paragraph 1 replicated article 53 of the 1969 Vienna Convention, and suggested that the second sentence, providing that treaties in conflict with *jus cogens* did not create any rights or obligations, be further clarified in the commentary. It was also suggested that the second sentence more closely track the formulation of article 71, paragraph 2 (a), of the Convention. It was also suggested that the second sentence was superfluous.

28. While recognizing that direct conflict of treaties with *jus cogens* was extremely rare, some members supported the inclusion of paragraph 3, providing that treaties should be interpreted in a manner consistent with *jus cogens*, as interpretative guidance for States. It was suggested that the commentary clarify that the provision should not override the rules of interpretation in the 1969 Vienna Convention and customary international law. The view was expressed that the issue of interpretation would presumably be pertinent to all sources of international law and was better addressed in a separate draft conclusion. Several drafting suggestions aimed at improving the clarity of the provision were made.

(ii) Draft conclusion 11

29. Some members welcomed paragraph 1, which confirmed that a treaty, which at the time of conclusion was in conflict with a *jus cogens* norm, could not be separated. A preference was expressed for a structure whereby the separability approach contained in paragraph 2 would be presented as the general rule, with non-severability (currently in paragraph 1) presented as a special rule applicable to the case of article 53 of the 1969 Vienna Convention. A more detailed consideration of the justification for applying different legal consequences to such situations was called for. The view was expressed that the draft conclusion could also cover acts of international organizations that create obligations for States. It was further suggested that paragraph 1 be redrafted to be consistent with paragraph 1 of draft conclusion 10, and that it should highlight the absoluteness of non-separability of treaty provisions in conflict with existing *jus cogens* norms.

(iii) Draft conclusion 12

30. The view was expressed that the phrase "any act in reliance of the treaty", at the end paragraph 1 of draft conclusion 12, was too broad to describe the relationship between the treaty and the act and could be replaced by "any act performed as a result of the implementation of the treaty". It was also suggested that the qualifier "as far as possible",

which appeared in article 71 of the 1969 Vienna Convention, be included in paragraph 1 to ensure the practicability of the provision, or that an explanation be included in the commentaries as to why the formulation of the provision differed slightly from article 71. It was further suggested that a new paragraph be inserted between paragraphs 1 and 2 tracking paragraph 1 (b) of article 71, to the effect that States must also bring their mutual relations into conformity with *jus cogens*. A further suggestion was to align the formulation of paragraph 2 with that of article 71, paragraph 2 (b), in particular by including a reference to the "maintenance" of rights, obligations or situations. The view was expressed that the draft conclusion should also have included the provisions of articles 69 and 70 of the 1969 Vienna Convention, dealing with invalidity or termination of treaties in all situations, including on account of conflict with *jus cogens*.

31. Since draft conclusion 12 dealt with the consequences of invalidity or termination of a treaty, it was also suggested that the provision was better placed after draft conclusion 14.

(iv) Draft conclusion 13

32. The view was expressed that paragraph 2 of draft conclusion 13 was of relevance to the field of human rights treaties, and reference was made to the general comment of the Human Rights Committee on reservations to the International Covenant on Civil and Political Rights,[58] to the effect that reservations contrary to peremptory norms in such a human rights treaty would not be compatible with its object and purpose. The view was expressed that the very existence of norms of *jus cogens* in a treaty did not mean that any reservation to the treaty, for example a reservation to a compromissory clause, was invalid. It was also suggested that the provision be located elsewhere in order to avoid any misunderstanding that disputes over reservations to a treaty were also subject to the recommended judicial settlement procedure contained in draft conclusion 14.

(v) Draft conclusion 14

33. Support was expressed for the proposed recommended dispute settlement procedure, which was aimed at facilitating a final decision on the invalidity of a treaty based on conflict with *jus cogens*. While some members were of the view that the disputes to be submitted to the International Court of Justice under the provisions should be limited to disputes concerning the invalidation of a treaty on account of conflict with norms of *jus cogens*, other members supported the extension of the procedure to disputes concerning the existence of a conflict between a treaty and a norm of *jus cogens*, as well as the consequences of invalidation. It was recalled that, while the Commission's 1966 draft articles had only included a reference to all means of dispute settlement, the States participating in the United Nations Conference on the Law of Treaties (the Vienna Conference) had deliberately included a special mechanism with respect to disputes concerning *jus cogens*, namely what became article 66, subparagraph (a), of the 1969 Vienna Convention. At the same time, it was questioned how the strong reluctance by States to accept judicial settlement in such circumstances, as evidenced by the significant number of reservations to article 66 of the Convention, could be overcome. The concern was also expressed that the resort to arbitration entailed a higher risk of inconsistency, which could run counter to the aim of consolidating the international legal system and achieving legal certainty. It was also queried whether the decision of the International Court of Justice, or of an arbitral tribunal, could lead to the invalidation or termination of the treaty, or would be merely declaratory.

34. Some members considered that the characterization of the procedure as being "recommended" had the effect of diluting the legally binding obligation on States Parties to the 1969 Vienna Convention to submit their disputes concerning the invalidity of a treaty owing to conflict with norms of *jus cogens* to the International Court of Justice. Such an

[58] Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V, para. 8.

outcome could risk leaving no definitive process for determining the invalidity of a treaty conflicting with *jus cogens*, and would create precisely the problem that States had sought to avoid when they included article 66 in the 1969 Vienna Convention. It was suggested, instead, that a unilateral assertion by a State as to the invalidity of a treaty due to its conflict with *jus cogens* could be the subject of another procedure, such as that contained in article 65 of the Convention; even if a national or regional court had already declared that a treaty violated a norm of *jus cogens*. It was also suggested that State consent to the jurisdiction of the International Court was not necessary when it came to a dispute regarding *jus cogens*. In terms of another proposal, a new paragraph could be added providing for the resort to the advisory jurisdiction of the International Court or to other amicable procedures for dispute settlement.

35. Other members questioned the necessity of including the draft conclusion in its entirety, since it was ultimately for States to choose the appropriate procedure for the resolution of disputes, and there was no hierarchy *per se* between the different methods listed in Article 33 of the Charter of the United Nations. The view was also expressed that the provision did not correspond with the approach of the Commission when developing draft conclusions, namely to reflect existing international law, since the Special Rapporteur had himself acknowledged that the provision did not reflect existing international law and had been included only as a recommended practice.

(vi) Draft conclusion 15

36. Support was expressed for the first two paragraphs concerning the consequences of *jus cogens* for customary international law, which followed the same approach as that applied to treaty law. At the same time, the view was expressed that the Commission should not circumvent the question of what made *jus cogens* norms different from rules of customary international law, since State consent was not the exclusive basis for *jus cogens*.

37. In terms of proposals for modifications, it was recalled that draft conclusions 3 and 5, as provisionally adopted by the Drafting Committee, had confirmed that a norm of *jus cogens* could be modified by a subsequent norm having the same character, and that customary international law was the most common basis for a norm of *jus cogens*, respectively. Accordingly, it was suggested that draft conclusion 15 could indicate the possibility that a rule of customary international law in conflict with a norm of *jus cogens* may still arise, so long as that new customary rule was accepted and recognized as a norm from which no derogation was permitted. Another suggestion was to include the words "not of a *jus cogens* character" in paragraph 1, as had been done in paragraph 2, in order to maintain the possibility of a replacement of one norm of *jus cogens* by another. It was suggested that the first paragraph be amended to indicate that practice and *opinio juris* cannot give rise to a norm of customary law if they conflict with *jus cogens*, instead of assuming that the rule of customary law already exists at the time of the conflict.

38. Several members expressed their satisfaction with paragraph 3, which excluded the applicability of the persistent objector rule with regard to norms of *jus cogens*, which, in their view, accorded with the without prejudice clause inserted in the draft conclusions on the identification of customary international law, adopted by the Commission on second reading, at the present session.[19] It was pointed out that a norm of *jus cogens* implied acceptance and recognition by a very large majority of States representing all regions and all legal systems. Accordingly, persistent objection by a small number of States concentrated in one region, for example, could not prevent the emergence of a *jus cogens* norm.

39. Nonetheless, some members were of the view that the proposed paragraph 3 did not fully reflect the complexity of the issue, which concerned the relationship between the superior status of *jus cogens* norms and the principle of State consent. The question was raised as to whether the status of a persistent objection, recognized at the stage of the formation of a rule of customary international law, should be denied if the customary rule subsequently attained the status of *jus cogens*. It was also suggested that there be further

[19] See chap. V above.

consideration given to the distinction between objections to an existing norm of *jus cogens* and objections raised during the formation of a norm of *jus cogens*. Another suggestion was that the question of persistent objection could be dealt with in the commentaries.

(vii) Draft conclusion 16

40. Several members emphasized the need to clarify the meaning of the term "unilateral act", as presented in the draft conclusion, for example by instead using the term "unilateral commitments", in order to emphasize that the draft conclusion related only to formal unilateral acts that created legal obligations. A suggestion was made to classify unilateral acts into three categories. It was queried whether the draft conclusion should also apply to international organizations. It was also suggested that the commentaries could clarify the distinction between unilateral acts and reservations.

(viii) Draft conclusion 17

41. Several members concurred with the position taken in draft conclusion 17 that binding obligations derived from resolutions of international organizations, including Security Council resolutions, should be invalid if they run counter to *jus cogens*. The view was expressed that the draft conclusions should address all resolutions of international organizations, including General Assembly resolutions concerning the maintenance of peace and security adopted in cases where the Security Council was unable to take a decision. It was also noted that other acts of international organizations, such as the regulations, directives and decisions taken by the European Union or acts by an intergovernmental conference, may also create legal obligations and should be addressed in the draft conclusions. Notwithstanding the paucity of State practice and the remoteness of the possibility of direct conflict with a *jus cogens* norm, some members still considered it important to single out Security Council resolutions, given their unique status owing to the application of Article 103 of the Charter of the United Nations, and their legal consequences for States in diverse fields of international law.

42. Other members doubted the appropriateness of the specific reference to the resolutions of the Security Council in the present project, which was aimed at formulating general rules. A concern was expressed as to its potential negative impact on the effectiveness of Security Council resolutions, and the collective security system established by the Charter of the United Nations. It was suggested that the provision could instead focus on the role of *jus cogens* norms as a reference for States when adopting resolutions within international organizations.

43. It was suggested that the provision should indicate that not only would the resolutions in violation of *jus cogens* no longer be binding, but they would also be invalid. Other suggestions included: making it clear that the consequences for international organizations should also include the duty of non-recognition and all other legal consequences arising from the conflict with a *jus cogens* norm, and that the possibility of separability be considered in relation to the invalidity of resolutions of international organizations, as in the case of the invalidity of treaties.

(ix) Draft conclusion 18

44. While supporting the proposition that *jus cogens* norms established obligations *erga omnes*, some members suggested that the commentaries should clarify the point that not all obligations *erga omnes* arose from *jus cogens* norms. A doubt was expressed as to whether it was correct to say that *jus cogens* norms "establish" obligations *erga omnes*. Some members suggested rephrasing the provision to better reflect the relationship between *jus cogens* norms and obligations *erga omnes*, as well as the consequences arising from them. It was also suggested that the formulation follow that of article 48, paragraph 1, of the articles on State responsibility. Another view expressed was that the draft conclusion should be limited to serious breaches of obligations arising under *jus cogens* norms, in line with articles 40 and 41 of the articles on State responsibility. The view was also expressed that the relationship between *jus cogens* and obligation *erga omnes* was complex and deserved more thorough and in-depth consideration, in order to present a broader

perspective on the issue and to reflect recent developments, such as the discussion as to whether obligations *erga omnes* could arise from rules relating to environmental protection.

(x) Draft conclusion 19

45. General agreement was expressed in relation to draft conclusion 19, which was based on article 26 of articles on State responsibility. At the same time, it was suggested that the provision follow the formulation of article 26 more closely. It was also proposed that the draft conclusions cover circumstances precluding wrongfulness in the context of the responsibility of international organizations. The view was further expressed that the draft conclusions could also cover countermeasures.

(xi) Draft conclusion 20

46. It was suggested that draft conclusion 20, paragraph 1, more closely follow the text of the *Legal Consequences for States* advisory opinion of the International Court of Justice by indicating that States were "under obligation"[20] to cooperate to bring to an end any serious breach of *jus cogens*. The view was also expressed that it was not clear whether a duty to cooperate reflected existing law, nor what precise obligations would flow from such duty.

47. It was suggested that paragraph 2 be aligned with paragraph 2 of article 40 of the articles on State responsibility, so as to read: "[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation".

48. Some members questioned the necessity of paragraph 3, regarding forms of cooperation, not least because the provision made no reference to the collective security mechanism of the United Nations, including the Security Council. Another view expressed was that paragraph 3 was an effort to progressively develop the operationalization of the obligation to cooperate through institutions or in an *ad hoc* manner, which was welcome and to be supported.

(xii) Draft conclusion 21

49. While draft conclusion 21 was generally supported, several members questioned the omission of the qualifier "serious" before "breach", as contained in article 41, paragraph 2, of the articles on State responsibility, since it expanded the principle beyond what was provided for in those articles. In particular, it was observed that the reasons advanced by the Special Rapporteur for the omission of the words "serious" could apply equally to the duty to cooperate. Another view was that, while there was a strong legal and policy basis for confining the duty to cooperate to serious breaches of *jus cogens* (as per draft conclusion 20), the same was not true with regard to the duties not to recognize and not to render assistance to a breach. In that regard, it was observed the Commission should engage in progressive development in that area.

50. It was proposed that a further paragraph be added indicating that the non-recognition of a situation created by a breach of *jus cogens* should not negatively affect acts related to the civilian population, such as the registration of births, deaths and marriages.

(xiii) Draft conclusion 22

51. Different views were expressed as to the propriety of dealing with the questions of individual criminal responsibility and immunity *ratione materiae* (draft conclusion 23) within the draft conclusions being developed. Several members expressed support for addressing both issues in the context of a study on the consequences of the breach of *jus cogens*, and thus supported their inclusion in the draft conclusions. Several other members were of the view that draft conclusions 22 and 23 addressed primary rules of international criminal law regarding criminal prosecution under national jurisdiction and the effects of a

[20] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, paras. 117–119.

specific subset of rules of *jus cogens*, namely those prohibiting international crimes. Such approach, it was maintained, deviated from the scope of the topic, which was to be limited to secondary rules of international law, and focusing on the general effect of all rules of *jus cogens*.

52. As regarded paragraph 1 of draft conclusion 22, several members noted that the third report provided ample evidence in both treaty and case law to support the existence of a legal duty for States to establish jurisdiction over crimes prohibited by *jus cogens*, which derived from the prohibition of international offences and the obligation of States to cooperate in order to put an end to the serious violation of *jus cogens*. Some members regretted that the provision excluded the principle of passive nationality, and suggested addressing the issue of conflict of jurisdiction in the commentaries.

53. Other members were of the view that the third report did not sufficiently demonstrate that State practice supported the existence under international law of a duty for every State to exercise national criminal jurisdiction over all offences prohibited by *jus cogens* when committed on its territory or by its nationals. On the contrary, the fact that half or even the majority of States had no statute on crimes prohibited by *jus cogens*, such as crimes against humanity, the crime of apartheid and the crime of aggression, evinced the lack of general belief that such a duty existed under international law. It was further maintained that the examples provided in the third report of States exercising national criminal jurisdiction in implementing a treaty did not necessarily substantiate the claim being made in paragraph 1.

54. Several members supported retaining paragraph 2 in the form of a without prejudice clause, so as to allow for the potential expansion of the exercise of domestic jurisdiction on the basis of universal jurisdiction. It was suggested that the phrase "in accordance with international law" be inserted to acknowledge the current ambiguous state of the international law as regarded universal jurisdiction.

(xiv) Draft conclusion 23

55. As regarded paragraph 1 of draft conclusion 23, the view was expressed that the rule of the irrelevance of official position was well established.

56. With regard to paragraph 2, several members were of the view that the Special Rapporteur had approached the issue in a comprehensive manner by examining practice, both in support and in opposition, of the non-applicability of immunity *ratione materiae* to *jus cogens* crimes, and correctly concluded that the balance of authorities was in favour of the non-applicability of immunity *ratione materiae* to an offence committed in contravention of a *jus cogens* norm. Support was also expressed for drawing a distinction between criminal and civil jurisdiction when addressing the issue of the exceptions to immunity *ratione materiae*. It was suggested that it be clarified, in the draft conclusions or the commentaries, to which crimes such exceptions would apply.

57. Other members were of the view that the practice cited by the Special Rapporteur in his third report did not support the draft conclusions he proposed. It was noted that draft conclusion 23, as proposed, was potentially even broader than draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction, adopted at the sixty-ninth session in 2017.[21] The concern expressed was that draft conclusion 23 could make it more difficult to reach agreement on the draft articles on immunity of State officials from foreign criminal jurisdiction, as well for the draft articles on crimes against humanity[22] to succeed as a convention.

58. Another view was that both positions in the Commission could be accommodated by narrowing the scope of the draft conclusion, including by developing a list of applicable crimes, and stressing the exceptional nature of the non-applicability of immunity *ratione materiae* in the commentary. Still others proposed leaving the provision in abeyance until

[21] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[22] *Ibid.*, para. 45.

the conclusion of the work on immunity of State officials from foreign criminal jurisdiction and crimes against humanity.

(xv) Future work

59. Some members expressed regret about the procedure being followed, whereby draft conclusions were left pending in the Drafting Committee, without being considered by the plenary on an annual basis with accompanying commentaries, until the conclusion of the first reading of the entire set of draft conclusions. Another view expressed was that the procedure being followed was not a real impediment, since States were able to react in the Sixth Committee to the reports of the Special Rapporteur and his proposed draft conclusions, as well as the oral interim reports of the respective Chairs of the Drafting Committee.

60. Support was expressed for the development of an illustrative list of *jus cogens* norms. It was suggested that the list could draw from *jus cogens* norms identified in the previous work of the Commission. It was stressed that it was important to take as much account as possible of the comments received from States on what norms should be included in such a list. Others expressed caution, since the Commission might take a long time to agree on even an illustrative list.

61. It was noted that the possibility of regional *jus cogens* had attracted some support from States in the Sixth Committee, and it was suggested that the existence and relationship of regional *jus cogens* norms to universally applicable *jus cogens* norms be studied. Others doubted the existence of regional *jus cogens* and warned that any discussion on regional *jus cogens* might undermine the integrity of, and be contrary to, the notion of *jus cogens* being norms "accepted and recognized by the international community as a whole".

62. While support was expressed for the Special Rapporteur's intention to conclude the first reading of the draft conclusions at the next session of the Commission, a view was expressed that the Commission should not unduly rush to conclude its work on the topic.

3. Concluding remarks of the Special Rapporteur

63. The Special Rapporteur noted that the Commission had been generally supportive of the approach taken in his third report, and of the proposed draft conclusions. He shared the views of members as to the importance of a proper exposition of the consequences of *jus cogens* norms for the stability of the international legal system. He agreed with the concerns expressed as to the potential risk of not including appropriate and responsible safeguards. He reiterated the purpose of the topic, which was not to develop new rules but to make existing rules more accessible and understandable. He admitted that the relative dearth of State practice presented a challenge, but maintained that it was not an insurmountable obstacle, nor should it justify a conservative approach to the topic. Rather, he emphasized that the Commission's role should be to faithfully assess the practice, together with other sources on which the Commission normally relied, in order to come to the most accurate description of existing international law. He pointed out that many of his proposed draft conclusions contained formulations drawn from the 1969 Vienna Convention. At the same time, it was worth recalling that the structure of the Convention was not designed with only *jus cogens* norms in mind.

64. Turning to the proposed draft conclusions, the Special Rapporteur thanked members for their various comments and proposals for amendments, which could be discussed in the Drafting Committee or be reflected in the commentary. Members had generally agreed with draft conclusions 10 to 13. The first two paragraphs of draft conclusion 10, read together, provided the principal consequence arising from treaties conflicting with *jus cogens* norms, namely such a treaty would either be void at the time of conclusion or would become void owing to the later emergence of the *jus cogens* norm. Both paragraphs were drawn from the 1969 Vienna Convention. He concurred with the proposal to formulate a single draft conclusion containing a general rule on interpretation, based on his proposal for draft conclusion 10, paragraph 3, which would be applicable to all sources of international law. The corresponding commentary would clarify that such rule should conform with the rules of interpretation in the 1969 Vienna Convention. He also agreed that good faith was the

central basis for such interpretative rule, which was captured by the qualification "as far as possible" and could be further explained in the commentaries. The principle of *pacta sunt servanda* was a significant reason for the coherent and integrationist approach to treaty interpretation, and, where it was possible to be consistent with *jus cogens*, such approach would always be more preferable than the invalidation of the treaty.

65. The Special Rapporteur shared the concerns raised by some members about the absoluteness of the non-severability rule in cases of a treaty conflicting with an existing norm of *jus cogens*, as reflected in draft conclusion 11, paragraph 1, but found it difficult to depart from the provisions of the 1969 Vienna Convention without a coherent legal basis drawn from State practice. He did not support the suggestion that reference be made in draft conclusion 12 to articles 69 and 70 of the Convention, since they were not concerned with specific consequences of *jus cogens*.

66. On draft conclusion 14, concerning a recommended dispute settlement procedure, the Special Rapporteur was not opposed to inserting a new paragraph drawing from article 65 of the 1969 Vienna Convention if it was generally agreed by members. He, however, doubted the appropriateness of subjecting the consequences of breaches of *jus cogens* norms to agreements concluded through negotiations by two or more States. He reiterated that draft conclusion 14 did not seek to impose anything on any State, or to address jurisdictional issues or standing. Nor, did it downplay the legally binding obligations of States Parties to the 1969 Vienna Convention. He agreed to expand the range of options for settlement of disputes, and to reformulate the second paragraph into a without prejudice clause. He further explained that the placement of draft conclusion 14 at the end of the first cluster of draft conclusions did not minimize the importance of a procedure for the settlement of disputes, but rather was intended to illustrate that such procedure was linked to the draft conclusions concerning the conflict between treaties and *jus cogens* norms.

67. To address the concern of some members as to the logic underlying draft conclusion 15, paragraph 1, the Special Rapporteur suggested reformulating the paragraph to read: "[a] customary international law rule does not arise if the practice on which it is based conflicts with a peremptory norm of general international law (*jus cogens*)". He further agreed that the Drafting Committee could insert the phrase "not of a *jus cogens* character" in paragraph 1 to resolve the issue concerning the modification of a peremptory norm by a subsequent peremptory norm. As regarded paragraph 3, he did not have any objection to drawing a link between the effect of persistent objection during the formation of customary international law and the non-applicability of persistent objection once a norm had acquired the status of *jus cogens*.

68. The Special Rapporteur agreed with those members who had maintained that it was appropriate to specifically single out Security Council resolutions in draft conclusion 17, because the discussion on the effects of *jus cogens* norms on acts of international organizations often took place in the context of Security Council decisions, given the unique power of the Council as well as Article 103 of the Charter of the United Nations.

69. The Special Rapporteur opposed inserting the qualifier "serious" in draft conclusion 18, which, according to him, found no support in the articles on State responsibility and did not appropriately capture the relationship between norms of *jus cogens* and obligations *erga omnes*. At the same time, he had no objection to consider, in the Drafting Committee, aligning the text of draft conclusion 18 on the relevant passage in the *Barcelona Traction* judgment.[23] He further sought to explain the omission of the same qualifier in draft conclusion 21, by noting that it would be absurd to suggest that it was lawful for States to recognize or even assist in breaches of *jus cogens* that "were not serious".

70. The Special Rapporteur also agreed that draft conclusions 18 to 21 should apply not only to States but also to international organizations.

[23] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

71. The Special Rapporteur conceded that draft conclusions 22 and 23 were different from other draft conclusions and that this might be provide a cogent reason for not including these draft conclusions. However, he pointed out that the issue of the effect of *jus cogens* norms on immunities had been explicitly referred to in paragraph 17 of the syllabus to the topic prepared at the time of the decision to include the topic in the long-term programme of work of the Commission.[24] The issue had not drawn any objection at the time of its consideration by the Commission, nor had the exclusion of immunities from the topic been suggested by States or members of the Commission at the time. He noted, as also indicated by some members, that there was abundant practice in support of both draft conclusions, and that the Commission had previously adopted important draft conclusions based on more scant practice. He was not convinced by the argument that the inclusion of the two draft conclusions would result in no agreement being reached on other topics being considered by the Commission. He, similarly, did not accept that there was insufficient practice to support draft conclusion 23. He recalled that cases concerning civil proceedings, such as *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that were often advanced to justify the view that there were no exceptions to immunity for international crimes of a *jus cogens* nature declared that they were not an authority for exceptions in cases related to criminal proceedings. While noting that these two draft conclusions enjoyed broad support from the Commission, he noted that, with a view to finding a way forward, both from a substantive point of view and from the perspective of attaining consensus in the Commission, the Commission might wish to address the issues mentioned by means of a without prejudice clause. In that context, he proposed that the Drafting Committee replace the two draft conclusions with a single without prejudice clause, which would read: "[t]he present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)". The corresponding commentary would indicate that immunity *ratione materiae* was one such issue implicated by the provision and would be drafted in a non-prejudicial matter.

72. As regarded the comments on the working method of keeping texts within the Drafting Committee, without the preparation of commentaries, the Special Rapporteur noted that such a working method had been previously agreed to by the Commission, as a compromise. He recalled further that the topic had, each year, been considered during the second half of the session with insufficient time for the preparation and adoption of commentaries. Nonetheless, he undertook to produce a full set of commentaries for consideration by the Commission, on the understanding that the topic would be considered during the first half of the 2019 session.

73. Finally, the Special Rapporteur assured members that he would consider carefully all their comments regarding future work when preparing his fourth report. He agreed with various suggestions in that regard, such as the inclusion of a bibliography and the need for consistency on the use of terms, as well as that general principles should also be covered in the project.

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[24] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), annex.

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Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter IX
Protection of the environment in relation to armed conflicts

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Chapter IX
Protection of the environment in relation to armed conflicts

A. Introduction

1. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[1]

2. The Commission received and considered three reports from its sixty-sixth session (2014) to its sixty-eighth session (2016).[2] At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.[3] At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur[4] and took note of the draft introductory provisions and draft principles, provisionally adopted by the Drafting Committee, which were subsequent were renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.[5] Accordingly, the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, at that session.[6] At the same session, the Commission also considered the third report of the Special Rapporteur,[7] and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,[8] without provisionally adopting any commentaries.

3. At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic, as Ms. Jacobsson was no longer with the Commission.[9] The Working Group, chaired by Mr. Vázquez-Bermúdez, had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session. The Working Group recommended to the Commission the appointment of a new Special Rapporteur for the topic to assist with the successful completion of its work on the topic.[10] Following an oral report by the Chairperson of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur.[11]

B. Consideration of the topic at the present session

4. At the present session, the Commission established, at its 3390th meeting, a Working Group, chaired by Mr. Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to draft principles 4, 6 to 8, and 14 to 18. The Working Group held two meetings, on 3 and 4 May 2018.

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[1] The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 167). For the syllabus of the topic, see *Yearbook ... 2011*, vol. II (Part Two), annex V.

[2] Documents A/CN.4/674 and Corr.1 (preliminary report), A/CN.4/685 (second report) and A/CN.4/700 (third report).

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. XI.

[4] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), chap. IX.

[5] Documents A/CN.4/L.870 and A/CN.4/L.870/Rev.1.

[6] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 188.

[7] *Ibid.*, chap. X.

[8] Document A/CN.4/L.876.

[9] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 255.

[10] *Ibid.*, para. 260.

[11] *Ibid.*, para. 262.

5. At its 3426th meeting, on 10 July 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18, which had been provisionally adopted by the Drafting Committee at the sixty-eighth session (see section C.1 below).

6. At the same meeting, the Commission began its consideration of the first report of Special Rapporteur Marja Lehto (A/CN.4/720). The Commission continued its consideration of the first report at its 3427th to 3431st meetings, from 11 to 17 July.

7. In her first report, the Special Rapporteur addressed the protection of the environment in situations of occupation. The report offered a general introduction to the protection of the environment under the law of occupation and addressed the complementarity between the law of occupation, international human rights law and international environmental law. The Special Rapporteur proposed three draft principles relating to the protection of the environment in situations of occupation, to be included in a separate part (Part Four). She also made some suggestions for the future programme of work on the topic.

8. At is 3431st meeting, on 17 July 2018, the Commission referred draft principles 19 to 21, as contained in the first report of the Special Rapporteur, to the Drafting Committee.[12]

9. At its … meeting, on … July 2018, the Chairperson of the Drafting Committee presented[13] the report of the Drafting Committee on "Protection of the environment in relation to armed conflicts", containing draft principles 19, 20 and 21 provisionally adopted by the Drafting Committee at the seventieth session (A/CN.4/L.911),[14] which can be found

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[12] The draft principles proposed by the Special Rapporteur in her first report read as follows:

"Part Four
Draft principle 19

1. Environmental considerations shall be taken into account by the occupying State in the administration of the occupied territory, including in any adjacent maritime areas over which the territorial State is entitled to exercise sovereign rights.

2. An occupying State shall, unless absolutely prevented, respect the legislation of the occupied territory pertaining to the protection of the environment.

Draft principle 20

An occupying State shall administer natural resources in an occupied territory in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21

An occupying State shall use all the means at its disposal to ensure that activities in the occupied territory do not cause significant damage to the environment of another State or to areas beyond national jurisdiction."

[13] The statement of the Chairperson of the Drafting Committee is available from the website of the Commission (http://legal.un.org/ilc).

[14] The text provisionally adopted by the Drafting Committee reads as follows:

"Part Four
Principles applicable in situations of occupation

Draft principle 19
General obligations of an Occupying Power

1. An Occupying Power shall respect and protect the environment of the occupied territory in accordance with applicable international law and take environmental considerations into account in the administration of such territory.

2. An Occupying Power shall take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.

3. An Occupying Power shall respect the law and institutions of the occupied territory concerning the protection of the environment and may only introduce changes within the limits provided by the law of armed conflict.

Draft principle 20
Sustainable use of natural resources

To the extent that an Occupying Power is permitted to administer and use the natural

on the website of the Commission. The Commission took note of the draft principles as presented by the Drafting Committee. It is anticipated that the Commission will take action on the draft principles and commentaries thereto at the next session.

10. At its ... to ... meetings, on ... 2018, the Commission adopted the commentaries to the draft principles provisionally adopted at the present session (see section C.2 below).

1. Introduction by the Special Rapporteur of her first report

11. The Special Rapporteur recalled the background of the topic, noting that it had been under active consideration by the Commission based on three reports submitted by her predecessor. She also emphasized the continued interest of States in the topic as well as the importance of consultations with the United Nations Environment Programme and the International Committee of the Red Cross. Her first report, which built on previous reports, did not set forth a new methodology and sought to ensure coherence with the work completed thus far. The report proposed three new draft principles on an issue that the Commission had identified for further consideration, namely, the protection of the environment in situations of occupation. The Special Rapporteur reiterated the temporal scope of the topic, which covered the whole conflict cycle and allowed the review of the law of armed conflict, international human rights law and international environmental law.

12. The law of occupation constituted a distinct legal regime, primarily based on the 1907 Hague Regulations and the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV). While these instruments provided only indirect protection to the environment, relevant concepts such as the notions of "civil life" and "usufruct" lend themselves to evolutive interpretation. Furthermore, the law of occupation had to be interpreted in the light of circumstances of the occupation, in particular its stability and duration. The Special Rapporteur recalled that, generally, an occupied territory is expected to be administered for the benefit of the occupied population, not the occupying State.

13. The report addressed the relationship between international human rights law, international environmental law and the law of occupation as *lex specialis*. International jurisprudence confirmed that human rights law applied alongside the law of occupation, while the exact content of the obligations depended on the nature and duration of the occupation. The report focused on the right to health as an example of how human rights law may contribute to environmental protection in the case of occupation. Customary and conventional environmental law also played a role in situations of occupation, particularly in relation to transboundary or global issues. The Special Rapporteur emphasized that such environmental obligations protected a collective interest and were owed to a wider group of States than those involved in an armed conflict or occupation.

14. The report contained proposals for three new draft principles. The Special Rapporteur proposed to place those in a new Part Four, as they could be relevant to armed conflicts as well as the post-conflict phase, depending on the nature of the occupation.

15. Draft principle 19 embedded the obligation of the occupying State to protect the environment in the general obligation to take care of the welfare of the occupied territories. The text of paragraph 1, for which the Special Rapporteur had proposed a reformulation during her introduction, found support in international human rights law and in the jurisprudence of international courts and tribunals. The relevant obligations covered land territory as well as adjacent maritime areas and superadjacent airspace. Paragraph 2

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resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.

Draft principle 21
Due diligence

An Occupying Power shall exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory."

reiterated the obligation of the occupying State to respect, unless absolutely prevented, the legislation of the occupied territory pertaining to the protection of the environment.

16. Draft principle 20 was based on the principle of usufruct as found in article 55 of the 1907 Hague Regulations while it also drew on the principle of sustainable use as its modern equivalent. It provided that the occupying State should exercise caution in the exploitation of non-renewable resources and exploit renewable resources in a way that ensured their long-term use and capacity for regeneration. The practical application of the principle would depend on the nature and duration of the occupation. The wording of draft principle 20 was based on article 54, paragraph 1, of the Berlin Rules on Water Resources as adopted by the International Law Association.[15]

17. Draft principle 21 incorporated the principle not to cause harm to the environment of another State. A central principle in international environmental law, the "no harm" principle applied to situations of occupation, as confirmed in international jurisprudence and Commission's earlier work. The wording was derived from the judgment of the International Court of Justice in *Pulp Mills on the River Uruguay*.[16] The words "at its disposal" notably allow for flexibility depending on the prevailing circumstances.

18. The Special Rapporteur further explained that the principles in Part One and Part Two applied to situations of occupation, and proposed to clarify in the commentary to draft principles 15 to 18, contained in Part Three, that they were also relevant to situations of occupation.

19. As to future work, the Special Rapporteur expressed the intention to address in her next report certain questions relating to the protection of the environment in non-international armed conflicts, questions relating to responsibility and liability for environmental harm in relation to armed conflicts, and issues related to the consolidation of a complete set of draft principles.

2. Summary of the debate

(a) General comments

20. Members supported the continuation of the methodology adopted by the previous Special Rapporteur, in particular the temporal approach to the topic. At the same time, it was reiterated that a strict temporal division might not always be feasible. A number of members agreed with the Special Rapporteur that the Commission should not seek to change international humanitarian law relating to occupation, but rather to fill gaps relating to environmental protection.

21. Some members supported the addition of a separate Part Four, dealing specifically with occupation. Some others insisted that occupation fell exclusively within the armed conflict phase (Part Two), while yet others maintained it related to the post-armed-conflict phase (Part Three). Several members supported the proposal of the Special Rapporteur to extend the application of certain draft principles already provisionally adopted by the Commission to the situation of occupation and noted that this should be indicated in the commentaries. It was proposed by some members to indicate in a separate draft principle that the draft principles in Parts One, Two and Three applied *mutatis mutandis* to situations of occupation.

22. Some members held that the report presented little State practice to bolster its findings, while others called for the inclusion of State practice from a wider variety of regions. Some members called for a definition of the concept of occupation, either in the commentary or in the text of the draft principles. Others maintained that providing a definition would not be necessary, while recognizing that situations of occupation may vary in nature and duration. It was also suggested by some members to take into consideration

[15] Berlin Rules on Equitable Use and Sustainable Development of Waters (International Law Association, *Report of the Seventy-First Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 334 *et seq.*, at p. 397).

[16] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p.14.

the legality or illegality of the occupation and to exclude the applicability of the occupation law to situations resulting from unlawful use of force.

23. Several members suggested addressing the issue of the applicability of the law of occupation to international organizations in the draft principles or in the commentaries. While some members suggested that international organizations could exercise functions similar to those of an Occupying Power, other members questioned this proposition. It was noted by some members that the international administration of a territory by an international organization was very different in nature to a belligerent occupation.

24. Several members suggested replacing the term "occupying State" with a more general reference to "Occupying Power", which was the term used in the relevant treaties.

25. Several members noted that, while the law of armed conflict predated international environmental law, the former had to be interpreted so as to incorporate elements of the latter. Others did not favour an evolutionary interpretation of the law of armed conflict.

26. Members noted that the law of occupation was a subset of the law of armed conflict, which only offered "indirect" protection to the environment. Members generally agreed that international human rights law and international environmental law continued to apply in situations of occupation, while the specificities of the law of armed conflict were to be taken into account. According to some members, international humanitarian law, as *lex specialis*, could set aside those bodies of law if the situation of occupation so required. Other members maintained that, in situations of occupation, military necessity did not override — but had to be balanced against — international human rights law and international environmental law obligations.

27. Several members emphasized that the application of international human rights law and international environmental law depended on the type of occupation, its nature and duration. In this regard, some members proposed drawing a distinction between different forms of occupation, such as "belligerent" or "military" occupation and "pacific" or "prolonged" occupation or "colonial" occupation. Other members pointed out that the focus of the report was on belligerent occupation and that such a distinction was therefore not necessary in this context.

28. Some members questioned the link drawn by the Special Rapporteur between the protection of property rights in situation of occupation and the protection of the environment. It was pointed out that harm to public or private property could not necessarily be equated to damage to the environment. Others maintained that the protection of the environment had become a core task of the modern State, and that the concept of "usufruct" could be interpreted in the current legal context to accommodate environmental considerations.

29. A number of members also noted that, while a significant part of the report dealt with international human rights law, the Special Rapporteur had not proposed a draft principle on that basis. Several members suggested the addition of a new draft principle, or a new paragraph, addressing the relevance of international human rights law, while some members were doubtful about the proposal and saw it as beyond the scope of the topic.

30. While agreeing that the right to health was relevant to the protection of the environment, several members encouraged the Special Rapporteur to extend her analysis to include other human rights, such as the right to life, the right to water and the right to food. A suggestion was made to focus on particularly vulnerable populations.

(b) Comments on draft principle 19

31. Members generally expressed support for the oral revision of paragraph 1 of draft principle 19 made by Special Rapporteur during her introduction of the report, while some members asked for further clarification of the proposed formulation. In particular, several members called for clarification of certain terms, including "general obligation", "environmental considerations" and "administration", or for reconsideration of the use of the words "territorial State" and "sovereign rights".

32. Some members questioned the reference to the maritime areas and airspace of the occupied territory. Other members maintained that the authority was limited to the areas over which the occupying State had established its authority and exercised effective control.

33. With regard to paragraph 2, members supported the position of the Special Rapporteur that an occupying State had a general obligation to respect the legislation of the occupied territory with regard to environmental protection. A number of members suggested that the Occupying Power enjoyed greater latitude to alter environmental legislation than the wording of paragraph 2 permitted, particularly to enhance the protection of the population. The view was expressed that in such cases the local population had to be consulted.

34. It was suggested that, apart from domestic legislation, occupying States should respect the international obligations pertaining to the protection of the environment that were incumbent on the occupied territory. It was also suggested that an occupying State was bound to its own obligations under international law.

35. Several drafting suggestions were made with regard to draft principle 19, including the addition of a further paragraph to the draft principle to reflect the role of international human rights law.

(c) Comments on draft principle 20

36. With regard to draft principle 20, some members supported the term "sustainable use", while a view was expressed that the term should be clarified. Other members expressed the view that the principle of sustainable use constituted a policy objective, rather than a legal obligation, and questioned its application to situations of occupation. Some members also questioned the link with the concept of usufruct, and how this concept applied to different categories of property, including private property, public goods and natural resources. Other members stressed that occupying States ought to consider sustainability in the administration and exploitation of natural resources.

37. In this regard, a number of members emphasized the importance of the principles of permanent sovereignty over natural resources and of the self-determination of peoples for the draft principles, while other members questioned the relevance of these principles.

38. Members emphasized that the Occupying Power should act for the benefit of the people under occupation, not for its own benefit. A suggestion was made to broaden the principle to apply to economic and social development of the occupied State more generally.

39. Some members also questioned the term "minimize" environmental harm, while a view was expressed that "prevent" would be more appropriate. The view was expressed that in situations of occupation, the focus was on eliminating and repairing environmental damage, in light of the draft principles contained in Part Three, rather than on the administration of natural resources.

40. Several drafting proposals were made with regard to draft principle 20.

(d) Comments on draft principle 21

41. Members generally expressed support for the inclusion of the no-harm or due diligence principle in draft principle 21, although a view was expressed that the principle had no place in the project. A suggestion was made to include therein the obligation to cooperate to prevent, reduce and control transboundary environmental pollution.

42. Certain drafting suggestions or clarifications were proposed, including with regard to the phrases "all the means at its disposal", "significant damage" and "areas beyond national jurisdiction". It was also suggested that the no-harm principle be extended to situations of armed conflict beyond occupation.

(e) Future work

43. Support was expressed for the proposals by the Special Rapporteur regarding future work on the topic. It was suggested that, in her next report, the Special Rapporteur address

the extent to which the draft principles apply to non-international armed conflicts; enforcement measures; compensation for environmental damage; and questions of responsibility and liability. The Special Rapporteur was also encouraged to clarify the role and obligations of non-State actors. A suggestion was made to elaborate on the relevance of the precautionary and "polluter pays" principles with regard to the topic, although opposition to this proposal was expressed.

44. Support was also expressed for completing the first reading on the topic in 2019, although it was noted that this was an ambitious goal.

3. Concluding remarks of the Special Rapporteur

45. Regarding the applicability of the law of occupation to international organizations, the Special Rapporteur noted that such law may have relevance to the administration of a territory, in particular to United Nations missions, provided that they entail the exercise of functions and powers over a territory that are comparable to those of an occupying State under the law of armed conflict. The Special Rapporteur pointed out that, even considering that the law of occupation could complement the mandate laid down in the relevant Security Council resolutions, there was very little actual practice of having recourse to the law of occupation for such purpose. This remained a theoretical possibility, and the issue was not mature enough to be addressed in the draft principles. The Special Rapporteur proposed to replace the term "occupying State" in the draft principles by the expression "Occupying Power", which could leave the door open for further developments in this regard.

46. The Special Rapporteur stressed that the distinction between belligerent occupation and pacific occupation had lost much significance, and that the presence of armed forces based on an agreement were already largely covered by draft principles 7 and 8. She reiterated that the focus of the report and of the draft principles was on belligerent — or military — occupation. In addition, the Special Rapporteur considered that no distinction between different forms of occupation was needed, since the law of armed conflict did not distinguish between different types of occupation. At the same time, the Special Rapporteur pointed out that the obligations of the occupying State under the law of occupation were to a certain extent dependent on the prevailing situation, and that a certain flexibility was thus recognized in its implementation.

47. With respect to the interplay of different areas of international law, the Special Rapporteur indicated that the requirements of the law of occupation as *lex specialis*, as well as the concrete realities of the situation, affected the extent to which other areas of international law, such as international human rights law and international environmental law, may complement the law of armed conflict. This did not mean that humanitarian principles, human rights and environmental considerations could be ignored, as the jurisprudence of the International Court of Justice made clear. The question therefore was not whether certain peacetime rules applied in situations of armed conflict or occupation, but how they applied.

48. On the general issue of the legality or illegality of occupation, the Special Rapporteur noted that the law of armed conflict applied whenever the criteria of armed conflict were fulfilled, regardless of the reasons of the conflict. She stressed that occupation law, from the perspective of international humanitarian law, applied equally to all occupations, whether or not they were the result of force used lawfully within the *jus ad bellum*.

49. The Special Rapporteur indicated that, although the first report focused on the right to health, other human rights were relevant from the point of view of environmental protection. She concluded that such rights could usefully be addressed in the commentary. The Special Rapporteur suggested that the relationship between the draft principles proposed in the first report and the draft principles already adopted by the Commission be clarified in the commentary.

50. The Special Rapporteur noted that the reformulation proposed in her introduction was generally supported. She added that the term "general obligation" was used in reference to article 43 of the Hague Regulations, which set forth the obligation of the

occupying State to restore and maintain public order and civil life. Such an obligation must be interpreted in light of current circumstances, including the importance of environmental concerns as an essential interest of all States and taking into account the development of international human rights law. She also indicated that the term "environmental considerations" were context-dependent and evolving, as indicated in the commentary to draft principle 11. The Special Rapporteur also indicated that latter part of paragraph 1, concerning the territorial scope of draft principle 19, could be addressed in the commentary. Regarding the second paragraph of draft principle 19, the Special Rapporteur acknowledged the usefulness of making reference to the international obligations of the occupied State, in addition to its legislation. Finally, the Special Rapporteur expressed her agreement with the proposal made by several members to include a provision related to the human rights obligations of the occupying State.

51. As regards draft principle 20, the Special Rapporteur noted that the first issue concerned the limits of the Occupying Power's right to administer and use the resources of the occupied territory. In that respect, she indicated that the proposal to add wording, either in the draft principle or the commentary, along the lines of the Institute of International Law's Bruges Declaration on the Use of Force,[17] could be useful. She added that the principle of permanent sovereignty over natural resources was also to be taken into account. Regarding the mention of "minimizing environmental harm", the Special Rapporteur stressed that the purpose of draft principles, as indicated in draft principle 2, was to enhance "the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict". Further, the Special Rapporteur recalled that draft principle 20 was grounded on article 55 of the Hague Regulations, which is binding as customary international law and should be interpreted to involve environmental aspects. In addition, the concept of sustainability, in particular in the context of sustainable use of natural resources, was well established, as reflected in the adoption by the General Assembly of the 2030 Agenda for Sustainable Development and the 17 Sustainable Development Goals.[18]

52. The Special Rapporteur indicated that draft principle 21 had met with broad agreement. In addition to the current language, two alternatives were supported deriving either from the advisory opinion of the International Court of Justice concerning the *Legality of the Threat or Use of Nuclear Weapons*[19] or from the Commission's draft articles on the prevention of transboundary harm from hazardous activities.[20]

53. Regarding future work on the topic, the Special Rapporteur clarified that her intention was to address non-international armed conflicts, as well as the questions of responsibility and liability, in the context of the topic and not to give a comprehensive presentation of these two areas. She noted that it would not be advisable to expressly limit the draft principles to one type of armed conflict given that the development of customary international law had a tendency to progressively reduce the importance of the distinction between international and non-international armed conflicts. This was also in line with the approach taken by the Commission on the topic so far.

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[17] Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 285 *et seq.*; available from www.idi-iil.org, Declarations.

[18] General Assembly resolution 70/1 of 25 September 2015.

[19] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

[20] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*

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Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter IX
Protection of the environment in relation to armed conflicts

Addendum

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C. Text of the draft principles on protection of the environment in relation to armed conflicts provisionally adopted so far by the Commission

2. Text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session

The text of the draft principles and commentaries thereto provisionally adopted by the Commission at its seventieth session is reproduced below.

Protection of the environment in relation to armed conflicts

Draft principle 4
Measures to enhance the protection of the environment

1. States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.

2. In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict.

Commentary

(1) The purpose of draft principle 4 is to ensure that States take effective measures to enhance the protection of the environment in relation to armed conflict. Paragraph 1 recalls obligations under international law and paragraph 2 encourages States voluntarily to take further measures to this end. The phrase "to enhance the protection of the environment", included in both paragraphs, corresponds to the purpose of the set of draft principles. Similarly, the phrase "in relation to armed conflict", also inserted in both paragraphs, is intended to underline the connection of environmental protection to armed conflict.

(2) Paragraph 1 reflects that States have obligations under international law to enhance the protection of the environment in relation to armed conflict and addresses the measures that States are obliged to take to this end. The obligation is denoted by the word "shall". The requirement is qualified by the expression "pursuant to their obligations under international law", indicating that the provision does not require States to take measures that go beyond their existing obligations. The specific obligations of a State under this provision will differ according to which relevant obligations under international law it is bound.

(3) Consequently, paragraph 1 is formulated broadly in order to cover a wide range of measures. The provision includes examples of the types of measures that can be taken by States, namely, "legislative, administrative, judicial and other measures". The examples are not exhaustive, as indicated by the open category "other measures". Instead, the examples aim to highlight the most relevant types of measures to be taken by States.

(4) The law of armed conflict imposes several obligations on States that directly or indirectly contribute to the aim of enhancing the protection of the environment in relation to armed conflict. The notion "under international law" is nevertheless broader and covers also other relevant treaty-based or customary obligations related to the protection of the environment before, during or after an armed conflict, whether derived from international environmental law, human rights law or other areas of law.

(5) As far as the law of armed conflict is concerned, the obligation to disseminate the law of armed conflict to armed forces and, to the extent possible, also to the civilian population contributes to the protection of the environment.[1] A relevant provision to this

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31, art. 47; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Convention II) (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85, art. 48; Geneva Convention relative to the Treatment of Prisoners of War (Convention III)

end is article 83 of Additional Protocol I, which provides that the High Contracting Parties are under the obligation to disseminate information on, among other provisions, articles 35 and 55[2] to their forces. This obligation can also be linked to common article 1 of the Geneva Conventions, in which States Parties undertake to respect and ensure respect for the Conventions in all circumstances.[3] Such dissemination can take place for instance through the inclusion of relevant information in military manuals, [4] as encouraged by the International Committee of the Red Cross (ICRC) Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict.[5]

(6) Common article 1 is also interpreted to require that States, when they are in a position to do so, exert their influence to prevent and stop violations of international humanitarian law by parties to an armed conflict.[6] As far as the protection of the environment is concerned, this could entail, for instance, sharing of scientific expertise as to the nature of the damage caused to the natural environment by certain types of weapons, or making available technical advice as to how to protect areas of particular ecological importance or fragility.

(7) A further obligation to conduct "a weapons review" is found in article 36 of Additional Protocol I. According to this provision, a High Contracting Party is under an obligation to determine whether the employment of a new weapon would, in some or all

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(Geneva, 12 August 1949), *ibid.*, No. 972, p. 135, art. 127; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287, art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Additional Protocol I) (Geneva, 8 June 1977), *ibid.*, vol. 1125, No. 17512, p. 3, art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II) (Geneva, 8 June 1977), *ibid.*, No. 17513, p. 609, art. 19; Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Additional Protocol III) (Geneva, 8 December 2005), *ibid.*, vol. 2404, No. 43425, p. 261, art. 7; and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Geneva, 10 October 1980), *ibid.*, vol. 1342, No. 22495, p. 137, art. 6.. See also J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Rules*, vol. I (Cambridge, Cambridge University Press, 2005), rule 143, pp. 505–508.

[2] Art. 35 of Additional Protocol I reads:

> "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Art. 55 reads:

> "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited."

[3] Geneva Convention I, art. 1; Geneva Convention II, art. 1; Geneva Convention III, art. 1; Geneva Convention IV, art. 1.

[4] Examples of States that have introduced such provisions in their military manuals include Argentina, Australia, Belgium, Benin, Burundi, Canada, Central African Republic, Chad, Colombia, Côte d'Ivoire, France, Germany, Italy, Kenya, Netherlands, New Zealand, Peru, the Russian Federation, South Africa, Spain, Sweden, Switzerland, Togo, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule45 (accessed on 7 May 2018).

[5] The Guidelines for Military Manuals and Instructions on the Protection of the Environment in Time of Armed Conflict (A/49/323, annex) states, in guideline 17, that: "States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of military and civil instruction".

[6] See the 2016 ICRC commentary (2016) on article 1 of Geneva Convention I, paras. 164–173.

circumstances, be prohibited by Additional Protocol I or by any other applicable rule of international law.[7] It is notable that the obligation covers the study, development, acquisition or adoption of all means or methods of warfare: both weapons and the way in which they can be used.[8] According to the ICRC commentary on the Additional Protocols, article 36 "implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality". A number of States, including States not party to Additional Protocol I, are known to have established such procedures.[9]

(8) The obligation to institute "a weapons review" binds all High Contracting Parties to Additional Protocol I. The reference to "any other rule of international law" makes it clear that the obligation goes beyond merely studying whether the employment of a certain weapon would be contrary to the law of armed conflict. This means, first, an examination of whether the employment of a new weapon, means or method of warfare would, in some or all circumstances, be prohibited by Additional Protocol I, including articles 35 and 55, which are of direct relevance to the protection of the environment. Second, there is a need to go beyond Additional Protocol I and analyse whether any other rules of the law of armed conflict, treaty or customary, or any other areas of international law might prohibit the employment of a new weapon, means or method of warfare. Such examination will include taking into account any applicable international environmental law and human rights obligations.[10]

(9) While Additional Protocol I applies only to international armed conflict, the weapons review provided for in article 36 also promotes the respect for the law in non-international armed conflicts. Furthermore, the use of weapons that are inherently indiscriminate and the use of means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering are prohibited under customary international law.[11] These rules are not limited to international armed conflict.[12] It follows that new weapons as well as methods of warfare are to be reviewed against all applicable international law, including the law governing non-international armed conflicts, in particular as far as the protection of civilians and the principle of distinction are concerned. The obligation not to use inherently indiscriminate weapons, means or methods of warfare has the indirect effect of protecting the environment in a non-international armed conflict. Furthermore, the special treaty-based prohibitions of certain weapons (such as biological and chemical weapons) that may cause serious environmental harm must be observed.

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[7] Additional Protocol I, art. 36.

[8] C. Pilloud and J. Pictet, "Article 35: Basic rules", *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmerman (eds.) (Geneva, Martinus Nijhoff, 1987), p. 398, para. 1402. The commentary on "Article 36: New weapons" refers to this section for an explanation of means and methods on p. 425, para. 1472.

[9] States that are known to have in place national mechanisms to review the legality of weapons and that have made the instruments setting up these mechanisms available to ICRC include Australia, Belgium, Canada, Denmark, Germany, the Netherlands, Norway, Sweden, the United Kingdom and the United States. Other States have indicated to ICRC that they carry out reviews pursuant to Ministry of Defence instructions, but these have not been made available. Information received from ICRC on 31 December 2017.

[10] Some States, such as Sweden, Switzerland and the United Kingdom, see a value in considering international human rights law in the review of military weapons because military personnel may in some situations (e.g. peacekeeping missions) use the weapon to conduct law enforcement missions. For further commentary, see S. Casey- Maslen, N. Corney and A. Dymond-Bass, "The review of weapons under international humanitarian law and human rights law", *Weapons under International Human Rights Law*, Casey-Maslen (ed.) (Cambridge University Press, Cambridge, 2014).

[11] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, rules 70 and 71, pp. 237–250.

[12] By virtue of the customary rule that civilians must not be made the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts. The prohibition of weapons that are by nature indiscriminate is also set forth in several military manuals applicable in non-international armed conflicts, for instance those of Australia, Colombia, Ecuador, Germany, Nigeria and the Republic of Korea. Information available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule71#Fn_1_19 (accessed on 8 May 2018).

(10) States also have the obligation to effectively exercise jurisdiction and prosecute those suspected of certain war crimes that have a bearing on the protection of the environment in relation to armed conflict, to the extent that such crimes fall within the category of grave breaches of the Geneva Conventions.[13] Examples of grave breaches, the suppression of which provides indirect protection to certain components of the natural environment, include wilfully causing great suffering or serious injury to body or health and extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly and unlawfully.

(11) Yet another treaty-based obligation is for States to record the laying of mines in order to facilitate future clearing of landmines and explosive remnants of war.[14]

(12) Paragraph 2 of the draft principle addresses voluntary measures that would further enhance the protection of the environment in relation to armed conflict. This paragraph is therefore less prescriptive than paragraph 1 and the word "should" is used to reflect this difference. The phrases "[i]n addition" and "further measures" both serve to indicate that this provision goes beyond the measures that States shall take pursuant to their obligations under international law, which are addressed in paragraph 1. Like the measures referred to in paragraph 1, the measures taken by States may be of legislative, judicial, administrative or other nature. Furthermore, they could include special agreements providing additional protection to the natural environment in situations of armed conflict.[15]

(13) In addition to encouraging States to take voluntary measures to enhance the protection of the environment in relation to armed conflict beyond their current obligations under international law, the paragraph captures the recent developments in the practice of States to this end.[16] One example of how States can continue this development is through providing more explicit guidelines on environmental protection in their military manuals.[17] Such guidelines may, for instance, aim to ensure training of military personnel involved in peace operations on the environmental aspects of the operation, as well as the conduct of environmental assessments.[18] Other measures that should be taken by States can aim at enhancing cooperation, as appropriate, with other States, as well as with relevant international organizations.

(14) The overall development that paragraph 2 aims to capture and encourage has its basis also in the practice of international organizations. One example of such practice is the United Nations initiative "Greening the Blue Helmets", which aims to function as an

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[13] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146.

[14] See, for example, the amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 3 May 1996) (hereinafter, "amended Protocol II to the Convention on Certain Conventional Weapons"), United Nations, *Treaty Series*, vol. 2048, No. 22495, p. 93.

[15] For special agreements, see Geneva Convention I, art. 6; Geneva Convention II, art 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7. See also common art. 3 of the Geneva Conventions.

[16] See, e.g., Slovenia, Rules of Service in the Slovenian Armed Forces, item 210; Paraguay, National Defence Council, *Política de Defensa Nacional de la Republica de Paraguay* [National Defence Policy of the Republic of Paraguay], 7 October 1999, para. 1 (A); and Netherlands, note verbale dated 20 April 2016 from the Permanent Mission of the Netherlands to the United Nations addressed to the Secretariat, para. 5. See also contributions in the Sixth Committee from Croatia (A/C.6/70/SR.24, para. 89), Cuba (*ibid.*, para. 10), the Czech Republic (A/C.6/70/SR.24, para. 45), New Zealand (A/C.6/70/SR.25, para. 102) and Palau (*ibid.*, para. 27).

[17] Examples of States that have done so include Australia, Burundi, Cameroon, Côte d'Ivoire, Netherlands, Republic of Korea, Ukraine, the United Kingdom and the United States. Information available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule44 (accessed on 8 May 2018). For further examples, see A/CN.4/685, paras. 69–76 and A/CN.4/700, para. 52.

[18] See the information on the United Nations Environment Programme (UNEP) website regarding post-crisis environmental recovery, available at www.unenvironment.org/explore-topics/disasters-conflicts/what-we-do/recovery.

environmental, sustainable management programme. [19] A further example of this development is the joint environmental policy developed by the United Nations Department of Peacekeeping Operations and Department of Field Services. The policy includes obligations to develop environmental baseline studies and adhere to a number of multilateral environmental agreements. References are made to treaties and instruments, including the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[20] the World Charter for Nature,[21] the Convention on International Trade in Endangered Species of Wild Fauna and Flora,[22] the Convention on Biological Diversity[23] and the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention),[24] as standards to be considered when a mission establishes its environmental objectives and procedures.[25]

Draft principle 6
Protection of the environment of indigenous peoples

1. States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.

2. After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.

Commentary

(1) Draft principle 6 recognizes that States should, due to the special relationship between indigenous peoples and their environment, take appropriate measures to protect such an environment in relation to an armed conflict. It further recognizes that where armed conflict has adversely affected the environment of indigenous peoples' territories, States should attempt to undertake remedial measures. In light of the special relationship between indigenous peoples and their environment, these steps should be taken in a manner that consults and cooperates with such peoples, respecting their relationship and through their own leadership and representative structures.

(2) The special relationship between indigenous peoples and their environment has been recognized, protected and upheld by international instruments such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization and the United Nations Declaration on the Rights of Indigenous Peoples,[26] as well as in the practice of States and in the jurisprudence of international courts and tribunals. To this end,

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[19] UNEP, Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations (Nairobi, 2012).

[20] Report of the United Nations Conference on the Human Environment (A/CONF.48/14/Rev.1; United Nations publication, Sales No. E.73.II.A.14), chap. I.

[21] General Assembly resolution 37/7 of 28 October 1982, annex.

[22] Opened for signature, Washington, 3 March 1975, United Nations, *Treaty Series*, vol. 993, No. 14537, p. 243.

[23] Convention on Biological Diversity (Rio de Janeiro, 5 June 1992), United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.

[24] Ramsar, 2 February 1971, United Nations, *Treaty Series*, vol. 994, No. 14583, p. 245.

[25] United Nations, Department of Peacekeeping Operations and the Department of Field Support, "Environmental Guidelines for UN Field Missions", 24 July 2009. See also the Department of Field Support website, available at https://fieldsupport.un.org/en/environment.

[26] See International Labour (ILO), Convention concerning Indigenous and Other Tribal Peoples in Independent Countries (Geneva, 27 June 1989) (Indigenous and Tribal Peoples Convention, 1989 (No. 169)), which revised the Indigenous and Tribal Populations Convention, 1957 (No. 107); United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 of 13 September 2007, annex, article 26. The reports of the Special Rapporteur on the rights of indigenous peoples, and the Special Rapporteur on human rights and the environment (formerly the Independent Expert on human rights and the environment) provide an overview of the rights of indigenous peoples in connection to the environment and natural resources.

the land of indigenous peoples has been recognized as having a "fundamental importance for their collective physical and cultural survival as peoples".[27]

(3) Paragraph 1 is based, in particular, on article 29, paragraph 1, of United Nations Declaration on the Rights of Indigenous Peoples, which expresses the right of indigenous peoples to "the conservation and protection of the environment and the productive capacity of their lands or territories and resources",[28] and article 7, paragraph 4, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which recognizes that "Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit".

(4) The specific rights of indigenous peoples over certain lands or territories may be the subject of different legal regimes in different States. Further, in international instruments concerning the rights of indigenous peoples, various formulations are used to refer to the lands or territories connected to indigenous peoples, and over which they have various rights and protective status.[29]

(5) Armed conflict may have the effect of increasing existing vulnerabilities to environmental harm or creating new types of environmental harm on the territories concerned and thereby affecting the survival and well-being of the peoples connected to it. Under paragraph 1, in the event of an armed conflict, States should take appropriate measures to promote the continuation of the relationship that indigenous peoples have with their ancestral lands. The appropriate protective measures referred to in paragraph 1 may be taken, in particular, before or during an armed conflict. The wording of the paragraph is broad enough to allow for the measures to be adjusted according to the circumstances.

(6) For example, the concerned State should take steps to ensure that military activities do not take place in the lands or territories of indigenous peoples unless justified by a relevant public interest. This could be achieved through avoiding placing military installations in indigenous peoples' lands or territories, and by designating their territories as protected areas, as set out in draft principle 5. In general, the concerned State should consult effectively with the indigenous peoples concerned prior to using their lands or territories for military activities.[30] During an armed conflict, the rights, lands and territories

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[27] See, for example, *Río Negro Massacres v. Guatemala*, in which the Inter-American Court of Human Rights recognized "the culture of the members of the indigenous communities corresponds to a specific way of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they constitute an integral component of their cosmovision, religious beliefs and, consequently, their cultural identity". *Río Negro Massacres v. Guatemala*, Judgment (Preliminary Objection, Merits, Reparations and Costs), Series C, Case No. 250, 4 September 2012, para. 177, footnote 266. C.f. *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs), Series C, Case No. 125, 17 June 2005, para. 135, and *Case of Chitay Nech et al. v. Guatemala, Judgment* (Preliminary Objections, Merits, Reparations, and Costs), Series C, Case No. 212, 25 May 2010, para. 147, footnote 160.

[28] See also American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016, Organization of American States, General Assembly, *Report of the Forty-Sixth Regular Session, Santo Domingo, Dominican Republic, June 13-15, 2016*, XLVI-O.2, *Proceedings*, vol. 1, resolution AG/RES. 2888 (XLVI-O/16), art. XIX, para. 4.

[29] See, for example, "lands or territories, or both as applicable, which they occupy or otherwise use" used in art. 13, 1, of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), or "lands, territories and resources" used in the preamble of United Nations Declaration on the Rights of Indigenous Peoples.

[30] See United Nations Declaration on the Rights of Indigenous Peoples, art. 30:

> "1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous people concerned.
>
> 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities."

of indigenous peoples also enjoy the protections provided by the law of armed conflict and applicable human rights law.[31]

(7) Paragraph 2 focuses on the phase after an armed conflict has ended. The purpose of this provision is to facilitate the taking of remedial measures in the event that an armed conflict has adversely affected the environment of the territories that indigenous peoples inhabit.[32] In doing so, it seeks to ensure the participatory rights of indigenous peoples in issues relating to their territories in a post-conflict context, while focusing on States as the subjects of the paragraph.

(8) In such instance, the concerned States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and, in particular, through their own representative institutions. In doing so, States should consider the special nature of the relationship between indigenous peoples and their territories — in its social, political, spiritual, cultural and other aspects. Further, States should consider that this relationship is often of a "collective" nature.[33]

(9) The need to proceed through appropriate procedures and representative institutions of indigenous peoples has been included to acknowledge the diversity of the existing procedures within different States that allow for effective consultation and cooperation with indigenous peoples, and the diversity of their modes of representation in order to obtain their free, prior and informed consent before adopting measures that may affect them.[34]

Draft principle 7
Agreements concerning the presence of military forces in relation to armed conflict

States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of

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[31] See the American Declaration on the Rights of Indigenous Peoples, art. XXX, paras. 3 and 4, which read:

"3. Indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict, in accordance with international humanitarian law.

4. States, in compliance with international agreements to which they are party, in particular those of international humanitarian law and international human rights law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, and Protocol II thereof relating to the protection of victims of non-international armed conflicts, shall, in the event of armed conflicts, take adequate measures to protect the human rights, institutions, lands, territories, and resources of indigenous peoples and their communities [...]".

[32] According to the United Nations Declaration on the Rights of Indigenous Peoples, art. 28, "[i]ndigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent". Similarly, the American Declaration on the Rights of Indigenous Peoples, art. XXXIII, states: "Indigenous peoples and individuals have the right to effective and suitable remedies, including prompt judicial remedies, for the reparation of any violation of their collective and individual rights. States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right."

[33] For example, see art. 13 of ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which states that "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship". Though specific to that Convention's application, it explicitly notes the collective aspects of the relationship that indigenous peoples have with their lands or territories.

[34] See for instance, United Nations Declaration on the Rights of Indigenous Peoples, art. 19. The Inter-American Court of Human Rights has established safeguards requiring States to obtain the "free, prior, and informed consent [of indigenous peoples], according to their customs and traditions". See *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), Series C, No. 172, 28 November 2007, para. 134.

military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures.

Commentary

(1) Draft principle 7 addresses agreements concluded by States among themselves and between States and international organizations, concerning the presence of military forces in relation to armed conflict. The phrase "in relation to armed conflict" underlines the purpose of the draft principles: to enhance the protection of the environment in relation to armed conflict. Consequently, the provision does not refer to situations in which military forces are being deployed without any relation to an armed conflict, since such situations are outside the scope of the topic.

(2) The draft principle is cast in general terms to refer to "agreements concerning the presence of military forces in relation to armed conflict". The specific designation and purpose of such agreements can vary, and may, depending on the particular circumstances, include status of forces and status of mission agreements. The purpose of the draft principle is to reflect recent developments whereby States and international organizations have begun addressing matters relating to environmental protection in agreements concerning the presence of military forces concluded with host States.[35] The word "should" indicates that this provision is not mandatory in nature, but rather aims at acknowledging and encouraging this development.

(3) Examples of environmental provisions in agreements concerning the presence of military forces in relation to armed conflict include the United States-Iraq agreement on the withdrawal of the United States from Iraq, which contains an explicit provision on the protection of the environment.[36] Another example is the status of forces agreement between the North Atlantic Treaty Organization (NATO) and Afghanistan, in which the parties agree to pursue a preventative approach to environmental protection.[37] The status of mission agreement under the European Security and Defence Policy also makes several references to environmental obligations.[38] Relevant treaty practice includes also the agreement between Germany and other NATO States, which states that potential environmental effects shall be identified, analysed and evaluated, in order to avoid environmental burden.[39]

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[35] The Agreement between the European Union and the former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the former Yugoslav Republic of Macedonia (*Official Journal* L 082, 29/03/2003 P. 0046 – 0051, annex; hereinafter, "*Concordia* status of forces agreement"), art. 9, provided a duty to respect international norms regarding, *inter alia*, the sustainable use of natural resources. See Agreement between the European Union and the Former Yugoslav Republic of Macedonia on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22003A0329(01) (accessed on 7 May, 2018).

[36] Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq (Baghdad, 17 November 2008), art. 8 (hereinafter, "United States-Iraq Agreement"). Available at www.state.gov/documents/organization/122074.pdf.

[37] Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan (Kabul, 30 September 2014), *International Legal Materials*, vol. 54, pp. 272–305, art. 5, para. 6, art. 6, para. 1, and art. 7, para. 2

[38] Agreement between the Member States of the European Union concerning the status of military and civilian staff seconded to the institutions of the European Union, of the headquarters and forces which may be made available to the European Union in the context of the preparation and execution of the tasks referred to in Article 17(2) of the Treaty on European Union, including exercises, and of the military and civilian staff of the Member States put at the disposal of the European Union to act in this context (EU SOFA) (Brussels, 17 November 2003). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A42003A1231%2801%29 (accessed on 7 May, 2018).

[39] Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Bonn, 3 August 1959), United Nations, *Treaty Series*, vol. 481, No. 6986, p. 329, amended by the

(4) Reference can also be made to other agreements concerning the presence of military forces with a less clear relation to armed conflict, such as the status of forces agreement between the United States and Australia, which contains a relevant provision on damage claims,[40] and the Enhanced Defence Cooperation Agreement between the United States and the Philippines, which contains provisions seeking to prevent environmental damage and provides for a review process.[41] Moreover, the memorandum of special understanding between the United States and the Republic of Korea contains several provisions on environmental protection.[42] Reference can further be made to arrangements applicable to short-term presence of foreign armed forces in a country for the purpose of exercises, transit by land or training.[43]

(5) The draft principle also provides a non-exhaustive list of provisions on environmental protection that may be included in agreements concerning the presence of military forces in relation to armed conflict. Thus the second sentence of the draft principle mentions "preventive measures, impact assessments, restoration and clean-up measures" as examples of what provisions of environmental protection may address. The presence of military forces may risk having an adverse impact on the environment.[44] In order to avoid such adverse impact to the extent possible, measures of a preventive nature are of a great importance. Impact assessments are necessary to determine the kind of restoration and clean-up measures that may be needed at the conclusion of the presence of military forces.

(6) The measures referred to in the draft principle may address a variety of relevant aspects. Some precise examples that deserve specific mention as reflected in treaty practice are: the recognition of the importance of environmental protection, including the prevention of pollution on facilities and areas granted to the deploying State,[45] an understanding that the agreement will be implemented in a manner consistent with protecting the environment,[46] cooperation and sharing of information between the host State and the sending State regarding issues that could affect the health and environment for citizens,[47] measures to prevent environmental damage,[48] periodic environmental performance assessments,[49] review processes,[50] application of the environmental laws of the host State[51]

Agreements of 21 October 1971 and 18 March 1993 (hereinafter, "NATO-Germany Agreement"), art. 54A.

[40] Agreement concerning the status of United States Forces in Australia (Canberra, 9 May 1963), United Nations, *Treaty Series*, vol. 469, No. 6784, p. 55 (hereinafter, "United States-Australia Agreement"), art. 12, para. 7 (*e*) (i).

[41] Agreement between the Philippines and the United States on enhanced defense cooperation (Quezon City, 28 April 2014) (hereinafter, "United States-Philippines Agreement"). Available at www.officialgazette.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/.

[42] Memorandum of Special Understandings on Environmental Protection, concluded between the United States and the Republic of Korea (Seoul, 18 January 2001) (hereinafter, "United States-Republic of Korea Memorandum"). Available at www.usfk.mil/Portals/105/Documents/SOFA/A12_MOSU_Environmental_Protection.pdf.

[43] See, e.g., Memorandum of Understanding between Finland and NATO regarding the provision of host nation support for the execution of NATO operations/exercises/similar military activity (4 September 2014), available at www.defmin.fi/files/2898/HNS_MOU_FINLAND.pdf, reference HE 82/2014. According to art. 3 (*g*), sending nations must follow host nation environmental regulations as well as any host nation's regulations for the storage, movement, or disposal of hazardous materials.

[44] See e.g. D.L. Shelton and S. Cutting, "If you break it, do you own it?", *Journal of International Humanitarian Legal Studies*, vol. 6 (2015), pp. 201–246, at pp. 210–211, and J. Taylor, "Environment and security conflicts: The U.S. Military in Okinawa", *The Geographical Bulletin*, vol. 48 (2007), pp. 6–7.

[45] See United States-Republic of Korea Memorandum.

[46] See United States-Iraq Agreement, art. 8.

[47] See United States-Republic of Korea Memorandum.

[48] See United States-Philippines Agreement, art. IX, para. 3, and NATO-Germany Agreement, art. 54A.

[49] These assessments could identify and evaluate the environmental aspects of the operation and can be accompanied by a commitment to plan, program and budget for these requirements accordingly, as in done the United States-Republic of Korea Memorandum.

[50] See United States-Philippines Agreement, art. IX, para. 2.

[51] See NATO-Germany Agreement, art. 54A, and United States-Australia Agreement, art. 12, para. 7 (*e*) (i).

or, similarly, a commitment by the deploying State to respect the host State's environmental laws, regulations and standards,[52] a duty to respect international norms regarding the sustainable use of natural resources,[53] the taking of restorative measures where detrimental effects are unavoidable,[54] and the regulation of environmental damage claims.[55]

(7) The phrase "as appropriate" signals two different considerations. First, agreements on the presence of military forces in relation to armed conflict are sometimes concluded under urgent circumstances in which it may not be possible to address issues of environmental protection. Second, sometimes it may be especially important that the agreement contains provisions on environmental protection. One such example is provided by a protected zone at risk of being affected by the presence of military forces. The phrase "as appropriate" therefore provides nuance to this provision and allows it to capture different situations.

Draft principle 8
Peace operations

States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof.

Commentary

(1) Peace operations can relate to armed conflict in multiple ways. Previously, many peace operations were deployed following the end of hostilities and the signing of a peace agreement.[56] As the High-level Panel on Peace Operations noted, today many missions operate in environments where no such political agreements exist, or where efforts to establish one have failed.[57] Moreover, modern United Nations peacekeeping missions are multidimensional and address a range of peacebuilding activities, from providing secure environments to monitoring human rights, or rebuilding the capacity of a State.[58] Mandates also include the protection of civilians.[59] Draft principle 8 intends to cover all such peace operations that may relate to multifarious parts or aspects of an armed conflict, and may vary in temporal nature.

(2) The words "in relation to armed conflict" delineate the scope of the draft principle. They make clear the connection to armed conflict so as to ensure that the obligations are not to be interpreted too broadly (i.e. as potentially applying to every action of an international organization related to the promotion of peace). While the term is to be understood from a broad perspective in the context of the draft principle, it is recognized that not all such operations have a direct link to armed conflict.

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[52] See United States-Iraq agreement, art. 8.

[53] As is done in art. 9 of the *Concordia* status of forces agreement.

[54] See NATO-Germany Agreement, art. 54A.

[55] NATO-Germany Agreement, art. 41, and United States-Australia Agreement, art. 12, para. 7 (*e*) (i).

[56] Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people (contained in A/70/95-S/2015/446), para. 23.

[57] *Ibid.*

[58] V. Holt and G. Taylor, *Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges*, independent study jointly commissioned by the Department of Peacekeeping Operations and the Office for the Coordination of Humanitarian Affairs (United Nations publication, Sales No. E.10.III.M.1), pp. 2–3.

[59] See for example the following mandates of United Nations-led missions found in Security Council resolutions: United Nations Mission in Sierra Leone (UNAMSIL) (1289 (2000)); United Nations Observer Mission in the Democratic Republic of the Congo (MONUC) (1291 (2000)); United Nations Mission in Liberia (UNMIL) (1509 (2003) and 2215 (2015)); United Nations Operation in Burundi (ONUB) (1545 (2004)); United Nations Stabilization Mission in Haiti (MINUSTAH) (1542 (2004)); United Nations Operation in Côte d'Ivoire (UNOCI) (1528 (2004) and 2226 (2015)); United Nations Mission in the Sudan (UNMIS) (1590 (2005)); African Union-United Nations Hybrid Operation in Darfur (UNAMID) (1769 (2007)); and United Nations Mission in the Central African Republic and Chad (MINURCAT) (1861 (2009)).

(3) The present draft principle covers operations where States and international organizations are involved in peace operations related to armed conflict and where groups of multiple actors may be present. All these actors will have some effect on the environment. For example, the Department of Peacekeeping Operations and the Department of Field Support recognize the potential damage by peacekeeping operations to the local environment.[60]

(4) The environmental impact of a peace operation may stretch from the planning phase through its operational part, to the post-operation phase. The desired goal is that peace operations should undertake their activities in such a manner that the impact of their activities on the environment is minimized. The draft principle thus focuses on activities to be undertaken in situations where the environment would be negatively affected by a peace operation. At the same time, it is understood that "appropriate" measures to be taken may differ in relation to the context of the operation. The relevant considerations may include, in particular, whether such measures relate to the pre-, in-, or post- armed conflict phase, and what measures are feasible under the circumstances.

(5) The draft principle reflects the growing recognition on the part of States and international organizations such as the United Nations, the European Union,[61] and NATO,[62] to consider the environmental impact of peace operations and to take necessary measures to prevent, mitigate and remediate negative impacts. For example, some United Nations field missions have dedicated environmental units to develop and implement mission-specific environmental policies and oversee environmental compliance.[63]

(6) There is no clear or definitive definition for "peace operation" or "peacekeeping" in existing international law, and the current draft principle is intended to cover broadly all such peace operations that relate to armed conflict. The Agenda for Peace highlighted that "peacemaking" was action to bring hostile parties to agreement, especially through peaceful means;[64] "peacekeeping" was the deployment of a United Nations presence in the field, involving military and/or police personnel, and frequently civilians as well; [65] while "peacebuilding" was to take the form of cooperative projects in a mutually beneficial undertaking to enhance the confidence fundamental to peace.[66] The report of the High-level Independent Panel on Peace Operations includes, for its purposes, "a broad suite of tools … from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations".[67] The term "peace operations" is thus aimed to cover all these types of operations, and operations broader than United Nations peacekeeping operations, including peace enforcement operations and operations by regional organizations. There is no reference in the text to "multilateral" peace operations, as it was considered unnecessary to address this expressly in the draft principle. The general

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[60] See United Nations, Department of Peacekeeping Operations and the Department of Field Support, "DFS Environment Strategy" (2017). Available at https://peacekeeping.un.org/sites/default/files/171116_dfs_exec_summary_environment_0.pdf (accessed on 8 May 2018). The strategy is complemented by an environmental policy and environmental guidelines on environment for United Nations field missions (see footnote 25 above).

[61] See, e.g., European Union, "Military Concept on Environmental Protection and Energy Efficiency for EU-led military operations", 14 September 2012, document EEAS 01574/12.

[62] See, e.g., NATO, "Joint NATO doctrine for environmental protection during NATO-led military activities", 8 March 2018, document NSO(Joint)0335(2018)EP/7141.

[63] "The future of United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations", Report of the Secretary-General (A/70/357-S/2015/682), para 129.

[64] "An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping" (A/47/277-S/24111), para. 20. See also the supplement thereto, a position paper by the Secretary-General on the occasion of the fiftieth anniversary of the United Nations (A/50/60-S/1995/1).

[65] *Ibid.*

[66] *Ibid.*, para. 56.

[67] A/70/95-S/2015/446, para. 18.

understanding of the term "peace operations" is nevertheless that it also concerns multilateral operations.

(7) "Prevent" has been used in acknowledgement of the fact that peace operations are not isolated in nature, and that in planning their actions, actors should plan or aim to minimize negative environmental consequences. While the prevention obligation requires action to be taken at an early stage, the notion of "mitigation" refers to reduction of harm that has already occurred. The notion of "remediation", in turn, has been used in the same sense as "remedial measures" in draft principle 2, encompassing any measure that may be taken to restore the environment.

(8) Draft principle 8 is distinctly separate in character from draft principle 7 and entails different obligations from those contained in the latter. Peace operations, unlike agreements concerning the presence of military forces in relation to armed conflict, do not necessarily involve armed forces or military personnel. Other types of actors such as civilian personnel and various types of specialists may also be present and covered by such operations. Draft principle 8 is also intended to be broader and more general in scope, and to direct focus on the activities of such peace operations.

(9) It is understood that the draft principle also encompasses reviews of concluded operations that would identify, analyse and evaluate any environmentally detrimental effects of those operations on the environment. This would be a "lessons learned" type of exercise to seek to avoid or minimize the negative effects of future peace operations on the environment and ensure that mistakes are not repeated.

Draft principle 14
Peace processes

1. Parties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the environment damaged by the conflict.

2. Relevant international organizations should, where appropriate, play a facilitating role in this regard.

Commentary

(1) Draft principle 14 aims to reflect that environmental considerations are, to a greater extent than before, being taken into consideration in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements.

(2) Including the term "peace process" in the draft principle is intended to broaden its scope to cover the entire peace process, as well as any formal peace agreements concluded.[68] Modern armed conflicts have a variety of outcomes that do not necessarily take the form of formal agreements. For example, at the end of an armed conflict, a ceasefire agreement, an armistice or a situation of *de facto* peace with no agreement could be reached. A peace process may also begin well before the actual end of an armed conflict. The conclusion of a peace agreement thus represents only one aspect, which, if at all, may take place several years after the cessation of hostilities. For this purpose, and to also avoid any temporal *lacuna*, the words "as part of the peace process" have been employed. The outcome of a peace process often involves different steps and the adoption of a variety of instruments.

[68] The United Nations peace agreements database, a "reference tool providing peacemaking professionals with close to 800 documents that can be understood broadly as peace agreements and related material", contains a huge variety of documents, such as "formal peace agreements and sub-agreements, as well as more informal agreements and documents such as declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, exchanges of letters and key outcome documents of some international or regional conferences ... The database also contains selected legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations". Selected resolutions of the Security Council are also included. The database is available at http://peacemaker.un.org/document-search.

(3) The phrase "[p]arties to an armed conflict" is used in paragraph 1 to indicate that the provision covers both international and non-international armed conflicts. This is in line with the general understanding that the draft principles apply to international, as well as non-international armed conflicts.

(4) The word "should" is used to reflect the normative value of the obligation, while also recognizing that it does not correspond to any existing legal obligation.

(5) The draft principle is cast in general terms to accommodate the wide variety of situations that may exist after an armed conflict. The condition of the environment after an armed conflict can vary greatly depending on a number of factors.[69] In some instances, the environment may have suffered serious and severe damage which is immediately apparent and which may need to be addressed as a matter of urgency; whereas, in others, the damage the environment has suffered may not be so significant as to warrant urgent restoration.[70] Some environmental damage may only become apparent months or even years after the armed conflict has ended.

(6) The draft principle aims to cover all formal peace agreements, as well as other instruments or agreements concluded or adopted at any point during the peace process, whether concluded between two or more States, between State(s) and non-State armed group(s), or between two or more non-State armed group(s). Such agreements and instruments may take different forms, such as sub-agreements to formal peace agreements, informal agreements, declarations, communiqués, joint public statements resulting from informal talks, agreed accounts of meetings between parties, as well as relevant legislation, acts and decrees that constitute an agreement between parties and/or were the outcome of peace negotiations.[71]

(7) Some modern peace agreements contain environmental provisions.[72] The types of environmental matters that have been addressed in the instruments concluded during the

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[69] For example, the intensity and duration of the conflict as well as the weapons used can all influence how much environmental damage is caused in a particular armed conflict.

[70] Well-known examples of environmental damage caused in armed conflict is the damage caused by the United States Armed Forces' use of Agent Orange in the Viet Nam War and the burning of Kuwaiti oil wells by Iraqi troops in the Gulf War, which are well documented. Instances of environmental damage, which range in severity, have also been documented other armed conflicts, such as the conflicts in Colombia, as well as in the Democratic Republic of the Congo, Iraq and Syria. See UNEP Colombia, available at www.unenvironment.org/news-and-stories/story/un-environment-will-support-environmental-recovery-and-peacebuilding-post (accessed on 9 May 2018); UNEP, "Post-conflict environmental assessment of the Democratic Republic of the Congo", available at https://postconflict.unep.ch/publications/UNEP_DRC_PCEA_EN.pdf (accessed on 9 May 2018); UNEP, "Post-conflict environmental assessment, clean-up and reconstruction in Iraq", available at https://wedocs.unep.org/bitstream/handle/20.500.11822/17462/UNEP_Iraq.pdf?sequence=1&isAllowed=y (accessed on 9 May 2018); "Lebanon Environmental Assessment of the Syrian Conflict" (supported by UNDP and EU), available at www.undp.org/content/dam/lebanon/docs/Energy%20and%20Environment/Publications/EASC-WEB.pdf (accessed on 9 May 2018). See also International Law and Policy Institute, "Protection of the natural environment in armed conflict: an empirical study" (Oslo, 2014), pp. 34–40.

[71] See C. Bell, "Women and peace processes, negotiations, and agreements: operational opportunities and challenges", Norwegian Peacebuilding Resource Centre, Policy Brief, March 2013, available at http://noref.no under "Publications", p. 1.

[72] Such instruments are predominantly concluded in non-international armed conflicts, between a State and a non-State actor and include the following: Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (Chapultepec Agreement) (Mexico City, 16 January 1992), A/46/864, annex, chap. II; Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), S/1999/648, annex; Arusha Peace and Reconciliation Agreement for Burundi (Arusha, 28 August 2000), available from http://peacemaker.un.org/node/1207, Protocol III, at p. 62, art. 12, para. 3 (*e*), and Protocol IV, at p. 81, art. 8 (*h*); Final Act of the Inter-Congolese Political Negotiations (Sun City, 2 April 2003), available from http://peacemaker.un.org/drc-suncity-agreement2003, resolution No. DIC/CEF/03, pp. 40–41, and resolution No. DIC/CHSC/03, pp. 62–65; Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, available from http://peacemaker.un.org/node/1369, chap. V, p. 71 and

peace process or in peace agreements include, for example, obligations for or encouragement to parties to cooperate regarding environmental issues, and provisions that set out in detail the authority that will be responsible for matters relating to the environment, such as preventing environmental crimes and enforcing national laws and regulations on natural resources and the sharing of communal resources.[73] The present draft principle aims to encourage parties to consider including such provisions in the agreements.

(8) Paragraph 2 aims to encourage relevant international organizations to take environmental considerations into account when they act as facilitators in peace processes. The wording of the paragraph is intended to be broad enough to cover situations where Chapter VII resolutions of the United Nations Security Council have been passed, as well as situations where relevant international organizations play a facilitating role at the consent of the relevant State or parties to an armed conflict in question.

(9) Paragraph 2 refers to "relevant international organizations" to signal that not all organizations are suited to address this particular issue. The organizations that are envisioned as being relevant in the context of this draft principle include those that have been recognized as playing an important role in the peace processes of various armed conflicts in the past, *inter alia*, the United Nations and its organs in particular, as well as the African Union, the European Union, the Association of Southeast Asian Nations and the Organization of American States.[74] The draft principle also includes the words "where appropriate" to reflect the fact that the involvement of international organizations for this purpose is not always required, or wanted by the parties.

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chap. III, p. 45, which set out as guiding principles that "the best known practices in the sustainable utilization and control of natural resources shall be followed" (para. 1.10) — further regulations on oil resources are found in paras. 3.1.1 and 4; Darfur Peace Agreement (Abuja, 5 May 2006), available from http://peacemaker.un.org/ node/535, chap. 2, at p. 21, art. 17, para. 107 (*g*) and (*h*), and at p. 30, art. 20; Agreement on comprehensive solutions between Uganda and Lord's Resistance Army/Movement (Juba, 2 May 2007), available from https://peacemaker.un.org/sites/peacemaker.un.org/files/UG_070502_AgreementComprehensiveSolutions.pdf, para. 14.6, and the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé, 7 July 1999), S/1999/777, annex, art. VII.

[73] Chapultepec Agreement, chap. II. Further regulations are found in art. 13 contained in annex II to the Peace Agreement; they prescribe that it is the role of the Environment Division of the National Civil Police to "be responsible for preventing and combating crimes and misdemeanours against the environment". The Arusha Peace and Reconciliation Agreement for Burundi, Protocol III, at p. 62, art. 12, para. 3 (*e*), and at p. 81, art. 8 (*h*), contains several references to the protection of the environment, one of which prescribes that one of the missions of the intelligence services is "[t]o detect as early as possible any threat to the country's ecological environment". Furthermore, it states that "[t]he policy of distribution or allocation of new lands shall take account of the need for environmental protection and management of the country's water system through protection of forests".

[74] The United Nations has acted as a facilitator in numerous armed conflicts, *inter alia* the armed conflicts in Angola, the Democratic Republic of the Congo, Libya and Mozambique. Regional organizations have also p' ved a facilitating role in the peace processes across the world. For example, the African Union has been involved in aspects of the peace processes in, *inter alia*, Comoros, Côte d'Ivoire, Guinea-Bissau, Liberia and Somalia. See Chatham House, Africa Programme, "The African Union's role in promoting peace, security and stability: from reaction to prevention?", meeting summary, available from www.chathamhouse.org, p. 3. The Organization of American States was involved in the peace process in, *inter alia*, the Plurinational State of Bolivia and Colombia. See P.J. Meyer, "Organization of American States: background and issues for Congress" (Congressional Research Service, 2014), available at www.fas.org, p. 8. See also African Union and Centre for Humanitarian Dialogue, *Managing Peace Processes: Towards more inclusive processes*, vol. 3 (2013), p. 106. The European Union has been involved in the peace processes in armed conflicts in, *inter alia*, the Middle East and Northern Ireland. See also Switzerland, Federal Department of International Affairs, "Mediation and facilitation in today's peace processes: centrality of commitment, coordination and context", presentation by Thomas Greminger, a retreat of the International Organization of la Francophonie, 15–17 February 2007, available from www.swisspeace.ch, under "Publications".

Draft principle 15
Post-armed conflict environmental assessments and remedial measures

Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures.

Commentary

(1) The purpose of draft principle 15 is to encourage relevant actors to cooperate in order to ensure that environmental assessments and remedial measures can be carried out in post-conflict situations. The draft principle is closely linked to draft principle 8.

(2) The reference to "relevant actors" includes both State and non-State actors. Not only States, but also a wide range of actors, including international organizations and non-State actors, have a role to play in relation to environmental assessments and remedial measures. The phrase "are encouraged" is hortatory in nature and is to be seen as an acknowledgment of the scarcity of practice in this field.

(3) The term "environmental assessment" is distinct from an "environmental impact assessment", which is typically undertaken *ex ante* as a preventive measure.[75] Such assessments play an important role in the preparation and adoption of plans, programmes, and policies and legislation, as appropriate. This may involve the evaluation of the likely environmental, including health, effects, in a plan or programme.[76]

(4) It is in this context that a post-conflict environmental assessment has emerged as a tool to mainstream environmental considerations in the development plans in the post-conflict phase. Such assessments are typically intended to identify major environmental risks to health, livelihoods and security and to provide recommendations to national authorities on how to address them.[77] A post-conflict environmental assessment is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.[78] Such post-conflict environmental assessment, undertaken at the request of a State, may be take the form of: (*a*) a needs assessment;[79] (*b*) a quantitative risk assessment;[80] (*c*) a strategic assessment;[81] or (*d*) a comprehensive assessment.[82] The comprehensive assessment of Rwanda, for example, involved a scientific expert evaluation and assessment, covering a range of activities, including scoping, desk

[75] See, for instance, Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991), United Nations, *Treaty Series*, vol. 1989, No. 34028, p. 309.

[76] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, available at www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/protocolenglish.pdf.

[77] Post-crisis environmental assessment, available at http://drustage.unep.org/disastersandconflicts/what-we-do/preparedness-response/post-crisis-environmental-assessment.

[78] D. Jensen, "Evaluating the impact of UNEP's post conflict environmental assessments", *Assessing and Restoring Natural Resources in Post-Conflict Peacebuilding*, Jensen and S. Lonergan (eds.), available at https://environmentalpeacebuilding.org/assets/Documents/LibraryItem_000_Doc_061.pdf, p. 18.

[79] A needs assessment and desk study can be done during or after a conflict, based on a collection pre-existing secondary information on environmental trends and natural resource management, challenges from international and national sources. Such information, with limited verification field visits, is then compiled into a desk study report that attempts to identify and prioritize environmental needs. *Ibid.*, pp. 18–19.

[80] A quantitative risk assessment, involving field visits, laboratory analysis and satellite imagery, focuses on the direct environmental impact of conflicts caused by bombing and destruction of buildings, industrial sites, and public infrastructure. *Ibid.*, pp. 19–20.

[81] A strategic assessment evaluates the indirect impact of the survival and coping strategies of local people and the institutional problems caused by the breakdown of governance and capacity. These tend to be longer in duration. *Ibid.*, p. 20.

[82] A comprehensive assessment seeks to provide a detailed picture of each natural resource sector and the environmental trends, governance challenges, and capacity needs. Based on national consultations with stakeholders, comprehensive assessments attempt to identify priorities and cost the required interventions over the short, medium, and long term. *Ibid.*, p. 20.

study, field work, environmental sampling, geographic information system modelling, analysis and reporting and national consultations. It is readily acknowledged that "conflicts often have environmental impacts, direct or indirect, that affect human health and livelihoods as well as ecosystem services".[83]

(5) Such assessments are encouraged because, if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to "further population displacement and socio-economic instability", thereby "undermining recovery and reconstruction in post-conflict zones" and "triggering a vicious cycle".[84]

(6) In order to align the text with other draft principles, in particular draft principle 2, the term "remedial" is used in the present principle even though "recovery" has a more prominent usage in the practice. Once an assessment is completed, the challenge is to ensure that environmental recovery programmes are in place that aim at strengthening the national and local environmental authorities, rehabilitate ecosystems, mitigate risks and ensure sustainable utilization of resources in the context of the concerned State's development plans.[85] The term "remedial measures" has a more limited remit than "recovery".

Draft principle 16
Remnants of war

1. After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law.

2. The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war.

3. Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices.

Commentary

(1) Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation. It seeks to ensure that toxic and hazardous remnants of war that are or that may cause damage to the environment are removed or rendered harmless after an armed conflict. This draft principle covers toxic and hazardous remnants of war on land, as well as those which have been placed or dumped at sea, as long as they fall under the jurisdiction or control of a former party to the armed conflict. The measures taken shall be subject to the applicable rules of international law.

(2) Paragraph 1 is cast in general terms. Remnants of war take various forms. They consist of not only explosive remnants of war but also other hazardous material and objects. Some remnants of war are not dangerous to the environment at all or may be less dangerous if they remain where they are after the conflict is over.[86] In other words, removing the

[83] DAC Network on Environment and Development Cooperation (ENVIRONET), "Strategic environment assessment and post-conflict development SEA toolkit" (2010), p. 4, available at http://content-ext.undp.org/aplaws_publications/2078176/Strategic%20Environment%20Assessment%20and%20Post%20Conflict%20Development%20full%20version.pdf.

[84] *Ibid.*

[85] UNEP, "Disasters and Conflicts Programme", available at http://www.un.org/en/events/environmentconflictday/pdf/UNEP_conflict_and_disaster_brochure.pdf, p. 3.

[86] For example, this is often the case with chemical weapons that have been dumped at sea. See T.A. Mensah, "Environmental damages under the Law of the Sea Convention", *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives*, J.E. Austin and C.E. Bruch

remnants of war may in some situations pose a higher environmental risk than leaving them where they are. It is for this reason that the draft principle contains the words "or render harmless", to illustrate that in some circumstances it may be appropriate to do nothing, or to take measures other than removal.

(3) The obligation to "seek to" is one of conduct and relates to "toxic and hazardous remnants of war" that "are causing or risk causing damage to the environment". The terms "toxic" and "hazardous" are often used when referring to remnants of war which pose a danger to humans or the environment, and it was considered appropriate to use the terms here.[87] The term "hazardous" is somewhat wider than the term "toxic", in that all remnants of war that pose a threat to humans or the environment may be considered hazardous, but not all are toxic. The term "toxic remnants of war" does not have a definition under international law, but has been used to describe "any toxic or radiological substance resulting from military activities that forms a hazard to humans and ecosystems".[88]

(4) The reference to "jurisdiction or control" is intended to cover areas within *de jure* and *de facto* control even beyond that established by a territorial link. The term "jurisdiction" is intended to cover, in addition to the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority extraterritorially.[89] The term "control" is intended to cover situations in which a State (or party to an armed conflict) is exercising *de facto* control, even though it may lack *de jure* jurisdiction.[90] It therefore "refers to the factual capacity of effective control over activities outside the jurisdiction of a State".[91]

(5) The present draft principle is intended to apply to international as well as non-international armed conflicts. For this reason, paragraph 1 addresses "parties to a conflict". The phrase "party to a conflict" has been used in various provisions of law of armed conflict treaties in the context of remnants of war.[92] It was considered appropriate to use the

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(eds.) (Cambridge, Cambridge University Press, 2000), pp. 226–249. The Chemical Munitions Search and Assessment (CHEMSEA) is an example of a project of cooperation among the Baltic States, which is partly financed by the European Union. Information on the CHEMSEA project can be found at http://ec.europa.eu/regional_policy/en/projects/finland/chemsea-tacklesproblem-of-chemical-munitions-in-the-baltic-sea. See also the Baltic Marine Environment Protection Commission (Helsinki Commission) website at www.helcom.fi/baltic-sea-trends/hazardous-substances/sea-dumped-chemical-munitions.

87 See, for more information, ICRC, "Strengthening legal protection for victims of armed conflicts", report prepared for the Thirty-first International Conference of the Red Cross and Red Crescent in 2011, No. 31IC/11/5.1.1 3, p. 18.

88 See M. Ghalaieny, "Toxic harm: humanitarian and environmental concerns from military-origin contamination", discussion paper (Toxic Remnants of War project, 2013), p. 2. See also www.toxicremnantsofwar.info/new-trw-publication-toxic-harm-humanitarian-and-environmental-concerns-from-military-origin-contamination/. For more information on toxic remnants of war, see also the Geneva Academy, *Weapons Law Encyclopedia*, available at www.weaponslaw.org under "Glossary", which cites ICRC, "Strengthening legal protection for victims of armed conflicts", p. 18. See the statements delivered by Austria, Costa Rica, Ireland and South Africa to the First Committee of the General Assembly as its sixty-eighth session, which are available from the paper-smart portal at http://papersmart.unmeetings.org.

89 See para. (9) of the commentary to draft art. 1 of the draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

90 Para. (12) of the commentary to draft art. 1, *ibid.*

91 A/CN.4/692, para. 33. Concerning the concept of "control", see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118, where it states that: "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."

92 See, for example, Protocol II to the Convention on Certain Conventional Weapons, as well as the Protocol on Explosive Remnants of War, annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to

term in the present draft principle as it is foreseeable that there may be situations where there are toxic or hazardous remnants of war in an area where a State does not have full control. For example, a non-State actor may have control over territory where toxic and hazardous remnants of war are present.

(6) Paragraph 2 should be read together with paragraph 1. It aims to encourage cooperation and technical assistance amongst parties to render harmless the remnants of war referred to in paragraph 1. It should be noted that paragraph 2 does not aim to place any new international law obligations on parties to cooperate. However, it is foreseeable that there may be situations where an armed conflict has taken place and a party is not in a position to ensure that toxic and hazardous remnants of war are rendered harmless. It was thus considered valuable to encourage parties to cooperate in this regard.

(7) Paragraph 3 contains a without prejudice clause that aims to ensure that there would be no uncertainty that existing treaty or customary international law obligations prevail. There are various laws of armed conflict treaties that regulate remnants of war, and different States thus have varying obligations relating to remnants of war.[93]

(8) The words "clear, remove, destroy or maintain", as well as the specific remnants of war listed, namely "minefields, mined areas, mines, booby-traps, explosive ordnance and other devices", were specifically chosen and are derived from existing law of armed conflict treaties to ensure that the paragraph is based on the law of armed conflict as it exists at present.[94]

(9) It should be noted that the draft principle does not directly deal with the issue of responsibility or reparation for victims on purpose. This is because responsibility to clear, remove, destroy or maintain remnants of war is already regulated to some extent under the existing law of armed conflict, at least in the sense that certain treaties identify who should take action.[95] The draft principle is without prejudice to the allocation of responsibility and questions of compensation.

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have Indiscriminate Effects (Protocol V) (hereinafter, "Protocol V to the Convention on Certain Conventional Weapons") (Geneva, 3 May 1996), United Nations, *Treaty Series*, vol. 2399, No. 22495, p. 100.

[93] See, for example, amended Protocol II to the Convention on Certain Conventional Weapons; Protocol V to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997), United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211; Convention on Cluster Munitions (Dublin, 30 May 2008), *ibid.*, vol. 2688, No. 47713, p. 39; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Geneva, 3 September 1992), *ibid.*, vol. 1974, No. 33757, p. 45.

[94] See the wording of the amended Protocol II to the Convention on Certain Conventional Weapons; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; Convention on Cluster Munitions.

[95] See, e.g., art. 3, para. 2, of the amended Protocol II Convention on Certain Conventional Weapons: "Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol." Art. 10, para. 2, in turn provides that: "High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control." In addition, art. 3, para. 2, of Protocol V to the Convention on Certain Conventional Weapons provides that: "After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control"; Convention on Cluster Munitions, art. 4, para. 1: "Each State Party undertakes to clear and destroy, or ensure the clearance and destruction of, cluster munition remnants located in cluster munition contaminated areas under its jurisdiction or control"; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, art. 5, para. 1: "Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control".

Draft principle 17
Remnants of war at sea

States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment.

Commentary

(1) Unlike the broader draft principle 16, which deals with remnants of war more generally, draft principle 17 deals with the specific situation of remnants of war at sea including the long-lasting effects on the marine environment. Draft principle 17 has added value as draft principle 16 only covers remnants of war under the jurisdiction or control of a former party to an armed conflict, which means that it is not wide enough to cover all remnants of war at sea. This draft principle expressly encourages international cooperation to ensure that remnants of war at sea do not constitute a danger to the environment.[96]

(2) Owing to the multifaceted nature of the law of the sea, a particular State could have sovereignty, jurisdiction, both sovereignty and jurisdiction, or neither sovereignty nor jurisdiction, depending on where the remnants are located.[97] It is therefore not surprising that remnants of war at sea pose significant legal challenges.[98] For example, the parties to the armed conflict may have ceased to exist, the coastal State may not have the resources to ensure that the remnants of war at sea do not constitute a danger to the environment, the coastal State may not have been a former party to the conflict, but the cooperation of that State may still be needed in efforts to get rid of remnants. Another foreseeable challenge is that the party that left the remnants may not have been in violation of its international law obligations at the time when that happened but these remnants now pose environmental risk.

(3) Accordingly, draft principle 17 addresses States generally, not only those which have been involved in an armed conflict. It aims to encourage all States, as well as relevant international organizations,[99] to cooperate to ensure that remnants of war at sea do not constitute a danger to the environment. The reference to "international organizations" is qualified with the word "relevant", in the light of the fact that the issues involved tend to be specialized.

(4) The words "should cooperate" rather than the more prescriptive "shall cooperate" were considered appropriate, given that this is an area where practice is still developing. Cooperation is an important element concerning remnants of war at sea, as the coastal States negatively affected by remnants of war at sea may not have the resources and thus not be capable of ensuring that remnants of war at sea do not pose environmental risks.

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[96] The need to take cooperative measures to assess and increase awareness of environmental effects related to waste originating from chemical munitions dumped at sea has been explicitly recognized by the General Assembly since 2010, including in General Assembly resolution 71/220. The resolution reaffirms the 2030 Agenda for Sustainable Development and recalls a number of relevant international and regional instruments. It furthermore notes the importance of raising awareness of the environmental effects related to waste originating from chemical weapons dumped at sea and invites the Secretary General to seek the views of Member States and relevant regional and international organizations on the cooperative measures envisaged in the resolution and identifying the appropriate intergovernmental bodies within the United Nations for further consideration and implementation, as appropriate, of those measures.

[97] See the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3. The remnants of war could be located in the territorial waters, the continental shelf, the exclusive economic zone or on the high seas, and this will have an impact on the rights and obligations of States.

[98] See A. Lott, "Pollution of the Marine Environment by Dumping: Legal Framework Applicable to Dumped Chemical Weapons and Nuclear Waste in the Arctic Ocean" 1 Nordic Environmental Law Journal (2015), p. 57 and W. Searle and D. Moody, "Explosive Remnants of War at Sea: Technical Aspects of Disposal", *Explosive Remnants of War: Mitigating the Environmental Effects*, A. Westing (ed.) (Taylor & Francis 1985).

[99] For example, the CHEMSEA project, which was initiated in 2011 as a project of cooperation among the Baltic States and partly financed by the European Union (see footnote 86 above).

(5) There are various ways in which States and relevant international organizations can cooperate to ensure that remnants of war at sea do not pose environmental risks. For example, they could survey maritime areas and make the information freely available to the affected States, they could provide maps with markers, and they could provide technological and scientific information and information concerning whether the remnants pose risks or may pose risks in the future.

(6) There is increasing awareness concerning the environmental effects of remnants of war at sea.[100] Dangers posed to the environment by remnants of war at sea could have significant collateral damage to human health and safety, especially of seafarers and fishermen.[101] The clear link between danger to the environment and public health and safety has been recognized in several international law instruments, and it was thus considered particularly important to encourage the cooperation amongst States and international organizations to ensure that remnants of war at sea do not pose danger.[102]

(7) Draft principle 17 intentionally does not deal with the any issues concerning the allocation of responsibility or compensation for damages regarding of remnants of war at sea. Determining which party has the primary obligation to ensure that remnants of war at sea do not pose environmental risks is a very complex and delicate issue to define, especially considering the varied legal nature of the law of the sea, ranging from internal waters to the high seas.

Draft principle 18
Sharing and granting access to information

1. To facilitate remedial measures after an armed conflict, States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.

2. Nothing in the present draft principle obliges a State or international organization to share or grant access to information vital to its national defence or security. Nevertheless, that State or international organization shall cooperate in good faith with a view to providing as much information as possible under the circumstances.

Commentary

(1) Draft principle 18 refers generally to "States", as this term is broader than "parties to an armed conflict". States not parties to an armed conflict may be affected as third States, and may have relevant information useful for the taking of remedial measures that could usefully be provided to other States or international organizations. This obligation applies to States, even though non-State actors are addressed in other draft principles, and the set of draft principles covers both international and non-international armed conflicts.

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[100] See General Assembly resolutions 65/149 of 20 December 2010 and 68/208 of 20 December 2013 and A/68/258. See also Mensah, "Environmental damages under the Law of the Sea Convention", p. 233.

[101] The Baltic Marine Environment Protection Commission (Helsinki Commission), governing body of the Convention on the Protection of the Marine Environment of the Baltic Sea Area, issued guidelines for fishermen that encounter sea-dumped chemical munitions at an early stage. For an easily accessible overview see the work done by the James Martin Center for Nonproliferation Studies at www.nonproliferation.org/chemical-weapon-munitions-dumped-at-sea/.

[102] There is a clear link between danger to the environment and public health and safety. See, for example, art. 55, para. 1, of Additional Protocol I provides for the protection of the natural environment in international armed conflicts and prohibits the use of means and methods of warfare which are intended or may be expected to cause environmental damage and thereby prejudice the health of the population; art. 1, para. 2, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992), United Nations, *Treaty Series*, vol. 1936, No. 33207, p. 269, stipulates that adverse effects on the environment include: "effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

(2) While States are typically the most relevant subjects, the draft principle also refers to international organizations, with the addition of the qualifier "relevant". The specific term "national defence" applies only to States. For some international organizations, confidentiality requirements may also affect the extent of information that they can share or grant access to in good faith.[103]

(3) While the term "share" refers to information provided by States and international organizations in their mutual relations and as a means of cooperation, the term "granting access" refers primarily to allowing access to individuals for example to such information, and thus signifies a more unilateral relationship.

(4) The obligation to share and grant access to information pertaining to the environment can be found in numerous sources of international law, both at global and regional level.

(5) The origins of the right to access to information in modern international human rights law can be found in article 19 of the Universal Declaration of Human Rights,[104] as well as in article 19 of the International Covenant on Civil and Political Rights.[105] General comment No. 34 on article 19 of the International Covenant on Civil and Political Rights provides that article 19, paragraph 2, should be read as including a right to access to information held by public bodies.[106]

(6) A right to environmental information has also developed within the context of the European Convention on Human Rights as exemplified in the case of *Guerra and Others v. Italy*,[107] in which the European Court of Human Rights decided that the applicants had a right to environmental information on the basis of article 8 of the Convention (the right to family life and privacy). Reference can also be made to the European Union directive on public access to environmental information and to a related judgment of the European Court of Justice of 2011.[108] In addition to the right to privacy, a right to environmental information has also been based on the right to freedom of expression (as in e.g. *Claude-Reyes et al. v. Chile* before the Inter-American Court of Human Rights).[109]

(7) Principle 10 of the 1992 Rio Declaration also provides that individuals shall have appropriate access to information, including on hazardous materials. The recently adopted Sustainable Development Goal 16 on peaceful and inclusive societies calls upon States to ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.[110]

(8) Article 2 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) defines "environmental information" as any information pertaining to the state of elements of the environment, factors affecting or likely to affect elements of the environment, as well as the state of human health and safety insofar as it may be affected by these elements.[111]

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[103] Cf. e.g. Office of the United Nations High Commissioner for Refugees (UNHCR), *Policy on the Protection of Personal Data of Persons of Concern to UNHCR* (2015), available at www.refworld.org/pdfid/55643c1d4.pdf.

[104] General Assembly resolution 217 (III) A of 10 December 1948.

[105] New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3.

[106] Human Rights Committee, general comment No. 34 (2011) on article 19 (freedoms of opinion and expression), *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I), annex V, para. 18.

[107] *Guerra and Others v. Italy*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

[108] Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information; *Office of Communications v. Information Commissioner*, case C-71/10, judgment of 28 July 2011.

[109] *Case of Claude-Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgement of 19 September 2006 (merits, reparations and costs), Series C, No. 151 (2006).

[110] General Assembly resolution 70/1 of 25 September 2015.

[111] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (Aarhus, Denmark, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, No. 37770, p. 447, art. 2.

Article 4 of the Aarhus Convention stipulates that State parties must "make such [environmental] information available to the public, within the framework of national legislation". Such a right necessarily entails a duty for States to collect such environmental information for the purposes of making it available to the public if and when requested to do so.

(9) The United Nations Framework Convention on Climate Change addresses access to information in its article 6, noting that the Parties shall "[p]romote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities: … public access to information on climate change and its effects".[112] In addition, the Cartagena Protocol on Biosafety to the Convention stipulates that Parties shall promote and facilitate access to information on living modified organisms.[113] Both the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,[114] and the Stockholm Convention on Persistent Organic Pollutants[115] contain provisions on access to information. Similarly, article 18 of the 2013 Minamata Convention on Mercury[116] stipulates that Parties shall "promote and facilitate" access to such information. The recently concluded Paris Agreement similarly addresses access to information in numerous paragraphs and articles, e.g. as part of the responsibility for States to provide intended nationally determined contributions in article 4, paragraph 8, of the Agreement, and more generally regarding climate change education and public access to information in article 12.[117]

(10) In accordance with the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Parties thereto shall make information on desertification "fully, openly and promptly available".[118] Similarly, the 2010 Bali Guidelines provide that "affordable, effective and timely access to environmental information held by public authorities upon request" should be ensured.[119]

(11) Within the particular regime of humanitarian demining and remnants of war, a number of instruments contain requirements on providing environmental information. For instance, a request to extend the deadline for completing the clearance and destruction of cluster munition remnants under the Convention on Cluster Munitions must outline any potential environmental and humanitarian impacts of such an extension.[120] Similarly, in connection to the destruction of cluster munitions, the "location of all destruction sites and the applicable safety and environmental standards" must be outlined.[121] Similar obligations

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[112] United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30882, p. 107.

[113] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, art. 23.

[114] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), United Nations, *Treaty Series*, vol. 2244, No. 39973, p. 337, art. 15.

[115] Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001), United Nations, *Treaty Series*, vol. 2256, No. 40214, p. 119, art. 10.

[116] Text available from https://treaties.un.org (*Status of Multilateral Treaties Deposited with the Secretary General*, chap. XXVII.17).

[117] Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex.

[118] United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (opened for signature, Paris, 14 October 1994), United Nations, *Treaty Series*, vol. 1954, No. 33480, p. 3, art. 16, also art. 19.

[119] United Nations Environment Programme, Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A, of 26 February 2010. Available from www.unep.org under "Resources".

[120] Art. 4, para. 6 (*h*).

[121] Art. 7 (transparency measures), para. 1 (*e*).

are contained in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[122] Reference can also be made to the International Mine Action Standard 10.70, which states, *inter alia*, that national mine action authorities should "promulgate information about significant environmental incidents to other demining organizations within the programme".[123]

(12) Regarding the practice of international organizations, the Environmental Policy for United Nations Field Missions of 2009 stipulates that peacekeeping missions shall assign an Environmental Officer with the duty to "[p]rovide environmental information relevant to the operations of the mission and take actions to promote awareness on environmental issues".[124] The policy also contains a requirement to disseminate and study information on the environment, which would presuppose access to information that can in fact be disseminated and that thus is not classified.

(13) Moreover, the ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict contain a provision on protection of organizations,[125] which could include environmental organizations gathering environmental data as a means of "contributing to prevent or repair damage to the environment".[126]

(14) In connection with post-armed conflict environmental assessments, it is worth recalling that the UNEP guidelines on integrating environment in post-conflict assessments include a reference to the importance of public participation and access to information, as "natural resource allocation and management is done in an ad-hoc, decentralized, or informal manner" in post-conflict contexts.[127]

(15) The obligation to *share information* and to cooperate in this context is reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses.[128] Moreover, the Convention on Biological Diversity contains a provision on exchange of information in its article 14, requiring that each Contracting Party shall, as far as possible and as appropriate, promote "notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate".[129] In addition, article 17 of the Convention calls upon the Parties to facilitate the exchange of information relevant to the conservation and sustainable use of biological diversity.

(16) Previous work of the Commission of relevance to this aspect of the draft principle includes the articles on nationality of natural persons in relation to the succession of States (1999),[130] articles on prevention of transboundary harm from hazardous activities (2001),[131]

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[122] Art. 5.

[123] IMAS 10.70, 1 October 2007, "Safety and occupational health, protection of the environment", para. 12.1 (a), available from www.mineactionstandards.org.

[124] United Nations, Department of Peacekeeping Operations and Department of Field Support, "Environmental Policy for United Nations Field Missions", 2009, para. 23.5.

[125] See ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, A/47/328, annex, guideline 19, referring to Geneva Convention IV, art. 63, para. 2, and Additional Protocol I, arts. 61–67.

[126] It should be noted that guideline 19 refers to pursuant to special agreements between the parties or permission granted by one of them.

[127] UNEP Guidance Note, *Integrating Environment in Post-Conflict Needs Assessments* (Geneva, 2009), available from http://postconflict.unep.ch/publications/environment_toolkit.pdf (as referenced in para. 144 and footnote 238 of A/CN.4/699).

[128] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49* (A/51/49), vol. III, resolution 51/229, annex, arts. 9, 11, 12, 14–16, 19, 30, 31 and 33, para. 7.

[129] Art. 14, para. 1 (c).

[130] General Assembly resolution 55/153 of 12 December 2000, annex, art. 18. The draft articles and the commentaries thereto are reproduced *in Yearbook ... 1999*, vol. II (Part Two), paras. 47–48.

[131] Arts. 8, 12–14 and 17.

principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006)[132] and the articles on the law of transboundary aquifers (2008).[133]

(17) The expression "in accordance with their obligations under international law" reflects that treaties contain obligations relevant in the context of the protection of the environment in relation to armed conflicts, which may be instrumental for the purpose of the taking of remedial measures after an armed conflict,[134] such as, for instance, keeping a record of the placement of landmines. Obligations to grant access to and/or share information which provide protection for the environment in relation to armed conflicts have been listed above. Also relevant is paragraph 2 of article 9 on "Recording and use of information on minefields, mined areas, mines, booby-traps and other devices" of Protocol II to the Convention on Certain Conventional Weapons, as well as article 4, paragraph 2, on "Recording, retaining and transmission of information" of Protocol V to the Convention on Certain Conventional Weapons.

(18) Furthermore, this expression reflects that the obligations to grant access to and/or share information as contained in the relevant treaties are commonly accompanied by exceptions or limitations regarding grounds for which the disclosure of information may be refused. Such grounds relate, *inter alia*, to "national defence and public security" or situations in which the disclosure would make it more likely that the environment to which such information related would be damaged.[135]

(19) Paragraph 2 serves a similar purpose in the context of draft principle 18. The exception to the obligation set out under paragraph 1 concerns information vital to the national defence of a State or the security of a State or an international organization. This exception is not absolute. The second sentence of the paragraph provides that States and international organizations shall provide as much information as possible under the circumstances, through cooperation in good faith. Paragraph 2 is based on provisions contained in the Convention on the Law of the Non-navigational Uses of International Watercourses. Article 31 of the Convention provides that a watercourse State is not obliged to provide data and information vital to its national defence or security, while noting that obligation to cooperate in good faith is still applicable. The articles on prevention of transboundary harm from hazardous activities[136] and the articles on the law of transboundary aquifers[137] contain a similar exception.

(20) Draft principle 18 is closely linked to the duty to cooperate, as well as draft principle 15 on post-armed conflict environmental assessments and remedial measures.

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[132] General Assembly resolution 61/36 of 4 December 2006, annex, principle 5. The draft principles and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. (Part Two), paras. 66–67.

[133] General Assembly resolution 63/124 of 11 December 2008, annex, arts. 8, 13, 15, 17 and 19. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

[134] Additional Protocol I, art. 33; Geneva Convention I, art. 16; Geneva Convention II, arts. 19 and 42; Geneva Convention III, art. 23; Geneva Convention IV, art. 137.

[135] See Aarhus Convention, art. 4, para. 3 (*b*); Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67, art. 9, para. 3 (*g*).

[136] Art. 14.

[137] Art. 19.

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Rapporteur: Ms. Patrícia **Galvão Teles**

Chapter X
Succession of States in respect of State responsibility

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Chapter X
Succession of States in respect of State responsibility

A. Introduction

1. At its sixty-ninth session (2017), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[1] The General Assembly subsequently, in its resolution 72/116 of 7 December 2017, took note of the decision of the Commission to include the topic in its programme of work.

2. At the same session, the Commission considered the first report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur's approach to the scope and outcome of the topic, as well as to provide an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the first report of the Special Rapporteur, to the Drafting Committee on the understanding that draft articles 3 and 4 would be left pending in the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee regarding draft articles 1 and 2, provisionally adopted by the Committee, which was presented to the Commission for information only.[2]

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/719), which was considered at its 3431st to 3435th meetings, from 17 to 24 July 2018.

4. In his second report, which was composed of four parts, the Special Rapporteur at first addressed certain introductory issues, including the legality of succession (Part One). He then discussed the general rules on succession of States in respect of State responsibility, particularly in relation to attribution and in relation to the difference between continuing and completed breaches (Part Two). Thereafter, the Special Rapporteur considered certain special categories of State succession to the obligations arising from responsibility (Part Three). The future programme of work on the topic was then addressed (Part Four). The Special Rapporteur proposed seven draft articles corresponding to the issues considered in Part One (draft article 5), Part Two (draft article 6), and Part Three (draft articles 7 to 11) of his second report.[3]

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[1] At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10)).

[2] The interim report of the Chairperson of the Drafting Committee is available on the website of the Commission at http://legal.un.org/ilc.

[3] The text of draft articles 5 to 11, as proposed by the Special Rapporteur in his second report, reads as follows:

Draft article 5
Cases of succession of States covered by the present draft articles

The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Draft article 6
General rule

1. Succession of States has no impact on the attribution of the internationally wrongful act committed before the date of succession of States.

2. If the predecessor State continues to exist, the injured State or subject may, even after the date of succession, invoke the responsibility of the predecessor State and claim from it a reparation for the damage caused by such internationally wrongful act.

3. This rule is without prejudice to the possible attribution of the internationally wrongful act to the successor State on the basis of the breach of an international obligation by an act having a continuing character if it is bound by the obligation.

4. Notwithstanding the provisions of paragraphs 1 and 2, the injured State or subject may claim reparation for the damage caused by an internationally wrongful act of the predecessor State also or solely from the successor State or States, as provided in the following draft articles.

Draft article 7
Separation of parts of a State (secession)

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of secession of a part or parts of the territory of a State to form one or more States, if the predecessor State continues to exist.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State or States.

4. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a predecessor State or in a territory under its administration shall be considered an act of the new State under international law.

Draft article 8
Newly independent States

1. Subject to the exceptions referred to in paragraph 2, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State in case of establishment of a newly independent State.

2. If the newly independent State agrees, the obligations arising from an internationally wrongful act of the predecessor State may transfer to the successor State. The particular circumstances may be taken into consideration where there is a direct link between the act or its consequences and the territory of the successor State and where the former dependent territory had substantive autonomy.

3. The conduct of a national liberation or other movement which succeeds in establishing a newly independent State shall be considered an act of the new State under international law.

Draft article 9
Transfer of part of the territory of a State

1. Subject to the exceptions referred to in paragraphs 2 and 3, the obligations arising from an internationally wrongful act of the predecessor State do not pass to the successor State when part of the territory of the predecessor State becomes part of the territory of the successor State.

2. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State will transfer to the successor State when the act was carried out by an organ of a territorial unit of the predecessor that has later become an organ of the successor State.

3. If particular circumstances so require, the obligations arising from an internationally wrongful act of the predecessor State, where there is a direct link between the act or its consequences and the territory of the successor State or States, are assumed by the predecessor and the successor State.

Draft article 10
Uniting of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State.

2. When a State is incorporated into another existing State and ceased to exist, the obligations from an internationally wrongful act of the predecessor State pass to the successor State.

3. Paragraphs 1 and 2 apply unless the States concerned, including an injured State, otherwise agree.

5. At its 3435th meeting, on 24 July 2018, the Commission decided to refer draft articles 5 to 11, as contained in the Special Rapporteur's second report, to the Drafting Committee, taking into account the views expressed in the plenary debate.

6. At its …th meeting, on … August 2018, the Chairperson of the Drafting Committee presented an interim oral report on draft article 1, paragraph 2, and draft articles 5 and 6, provisionally adopted by the Drafting Committee. The report was presented for information only and is available on the website of the Commission.[4]

1. Introduction by the Special Rapporteur of the second report

7. The Special Rapporteur indicated that his second report took into account the comments from members of the Commission and from delegates in the Sixth Committee. In relation to the general rule underlying the topic of succession to responsibility, the Special Rapporteur considered that a general theory of non-succession should not be replaced by another similar theory in favour of succession: a more flexible and realistic approach was needed. While consistency with the previous work of the Commission was important, especially in relation to terminology, it was unnecessary to adopt the same structure as the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983. The previous work of the Commission on State responsibility for internationally wrongful acts was equally essential.

8. In that regard, the Special Rapporteur remarked that the complex legal regime of State responsibility had already been codified by the Commission in its articles on responsibility of States for internationally wrongful acts,[5] which largely reflected customary international law. The general principles and rules arising therefrom should thus be applied or developed, if necessary, to serve as guidance for States facing problems of responsibility in cases of succession. The question of succession had to be considered not with respect to "responsibility" *in abstracto* but rather with respect to the principles and rules of a secondary character governing, in particular: the establishment of an internationally wrongful act and its attribution to a given State; the content and forms of responsibility; and the invocation of such responsibility. Any general rules identified would then be subject to exceptions and modifications, taking into account various factors, such as whether the breach was completed or continuing, whether damage was localized, and whether the predecessor State continued to exist or not. The latter issue was especially significant, in the view of the Special Rapporteur.

9. Seven new draft articles had been proposed by the Special Rapporteur in his second report. In addition to addressing certain general rules (draft arts. 5 and 6), the draft articles focused on the transfer of obligations arising from the internationally wrongful act of the predecessor State (draft arts. 7 to 11). Draft article 5 dealt with the issue of legality of succession, providing that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. The Special Rapporteur had initially been hesitant to address such a potentially controversial issue, given that, in addition to clear cases of illegal succession, there were also cases which belonged to a

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Draft article 11
Dissolution of State

1. When a State dissolves and ceases to exist and the parts of its territory form two or more successor States, the obligations arising from the commission of an internationally wrongful act of the predecessor State pass, subject to an agreement, to one, several or all the successor States.

2. Successor States should negotiate in good faith with the injured State and among themselves in order to settle the consequences of the internationally wrongful act of the predecessor State. They should take into consideration a territorial link, an equitable proportion and other relevant factors.

[4] http://legal.un.org/ilc.

[5] General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

"grey" or "neutral" zone which was possibly not governed by international law. Draft article 5 was therefore a modest provision modelled on article 6 of the Vienna Convention on Succession of States in Respect of Treaties of 1978, and consistent with other provisions previously adopted by the Commission, as well as with the work undertaken by the Institute of International Law.

10. The second general provision was draft article 6, which set out the general rule applicable to the succession of States in respect of State responsibility, namely the principle of non-succession when it comes to the establishment of an internationally wrongful act. The draft article provided that succession of States had no impact on the attribution of an internationally wrongful act committed before the date of succession of States. It then addressed the possible impact on succession to responsibility of the distinction between instantaneous and continuing breaches, as well the issue of composite acts.

11. The five draft articles that followed draft article 6 developed and modified the general rule expressed therein. They considered individual categories of succession and specified the circumstances where the obligations arising from an internationally wrongful act rested with the predecessor State and those where they passed to the successor State. The five draft articles were divided in two groups. Draft articles 7, 8 and 9 dealt with cases of succession where the predecessor State continued to exist, while draft articles 10 and 11 dealt with situations where the predecessor State had ceased to exist.

12. Draft articles 7, 8 and 9 addressed respectively the separation of parts of a State, the establishment of a newly independent State, and the transfer of part of the territory of a State. They were similarly structured. First, they expressed the general rule that obligations arising from an internationally wrongful act of the predecessor State did not pass to the successor State; then, they identified exceptions that applied in particular circumstances, such as a direct link between the act or its consequences and the territory of the successor State or States. Draft articles 7 and 9 also addressed the possibility of an act carried out by an organ of a territorial unit of the predecessor State that had later become an organ of the successor State.

13. Draft article 10 dealt with the two situations of merger of States and incorporation of a State into another existing State, while draft article 11 addressed the dissolution of State. The latter draft article underlined the role of agreements that should be negotiated in good faith by successor States.

14. The Special Rapporteur indicated that the final wording and placement of draft articles 3 and 4, as proposed on the first report and referred to the Drafting Committee, may be left for discussion at a later stage. In relation to the future programme of work, the Special Rapporteur reiterated his intention of following the programme outlined in his first report (A/CN.4/708, para. 133) with the necessary flexibility. The issue of forms and invocation of reparation might require further analysis in the future, and some additional definitions might be included in draft article 2 on the use of terms. In principle, the third report (2019) would focus on the transfer of the rights or claims of an injured predecessor State to the successor State. The fourth report (2020) would then address procedural and miscellaneous issues, including the plurality of successor States and the issue of shared responsibility, as well as issues concerning injured international organizations and injured individuals. The Special Rapporteur envisaged that the entire set of draft articles might be adopted on first reading in 2020 or 2021, depending on the progress of the debate.

2. Summary of the debate

(a) General comments

15. Members generally welcomed the second report of the Special Rapporteur and commended its structure. Several members remarked that the scarcity of State practice on succession of States in respect of State responsibility presented significant challenges to the work of the Commission on the topic. Some members agreed with the Special Rapporteur that the available State practice was diverse, context-specific and often politically sensitive, and observed that not many relevant decisions by domestic and international courts and tribunals were available. According to a number of members, such difficulties confirmed

the initial misgivings expressed by some members as to the suitability of the topic for codification or progressive development. Several members expressed caution at the heavy reliance of the report of the Special Rapporteur on academic writings and on the work of the Institute of International Law. In addition, it was noted that the practice considered in the report, although generally more diverse than in his first report, had still predominantly focused on European sources and examples.

16. Several members agreed with the Special Rapporteur that it was possible to identify an underlying general rule applicable to the succession of States in respect of State responsibility, according to which State responsibility did not automatically transfer to the successor State, except in certain circumstances. It was underlined that a realistic and flexible approach was needed in that regard, as the Special Rapporteur had remarked. Other members of the Commission expressed the view that identifying several rules would be more practical than attempting to confirm the existence of a single underlying general rule, which could be impossible to determine.

17. The scope of possible exceptions to the underlying general rule of non-succession was the object of considerable debate. Several members cautioned against replacing a general theory of non-succession to State responsibility with a similarly general presumption of succession. It was noted that some of the draft articles proposed by the Special Rapporteur in fact espoused such a presumption of succession, especially in relation to cases where the predecessor State no longer existed. In the view of several members, such proposals were based on policy grounds rather than State practice, and were more in the nature of progressive development, if not *de lege ferenda*, rather than codification of existing international law. In that respect, it was highlighted that it was important to clarify the extent to which each of the draft articles would constitute progressive development or codification of international law.

18. In relation to the methodology adopted by the Special Rapporteur, some members expressed doubts as to the separation of the issues of succession to obligations arising from an internationally wrongful act of a predecessor State (considered in the second report) from the issues concerning the rights and claims arising from an internationally wrongful act injuring a predecessor State (to be considered in the third report). In their view, that might lead to unnecessary duplication of work. In relation to the categories of succession to be analysed, a number of members agreed with the basic distinction proposed by the Special Rapporteur between cases where the predecessor State continued to exist and cases where it did not. Other members, however, suggested that such a distinction was not necessarily borne out by State practice, but was rather the result of policy considerations. Members also generally agreed that it was important to maintain consistency with the previous work of the Commission, both in matters of terminology and substance, especially in relation to the articles on responsibility of States for internationally wrongful acts.

19. In relation to the subsidiary nature of the proposed rules, a number of members proposed that a draft article be added stating that the draft articles would only apply in the absence of any agreement between the parties, including the injured State of an internationally wrongful act. In that regard, the fundamental role of treaties, other agreements, and unilateral undertakings by successor States was underlined by some members. The view was also expressed that caution was required in inferring general rules from existing agreements, which were often narrow in scope and only bound the parties thereto. According to a view, the Commission should focus its work solely on the responsibility of States for internationally wrongful acts whose injured parties were also States.

20. Some members proposed changing the title of the topic to "State responsibility problems in cases of succession of States". Suggestions were also made as to the possible structuring of the draft articles in several parts.

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(b) Specific comments

(i) Draft article 5 — Cases of succession of States covered by the present draft articles

21. Members generally expressed their support for draft article 5, the wording of which was consistent with the previous work of the Commission. It was noted that the draft article was also consistent with the fundamental principle *ex injuria jus non oritur* and with General Assembly resolution 2625 (XXV) of 1970 (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations). In relation to the legality of succession, some members remarked that no third category existed beyond lawful and unlawful cases of succession. Other members considered that the question of legality of succession should be considered separately from the possible consequences, in terms of responsibility, of unlawful succession, including in relation to any unlawful territorial changes occurring before it. The view was also expressed that draft article 5 might not accomplish its intended purpose, because the exclusion of unlawful succession from the scope of application of the draft articles might lead to a paradoxical advantage for unlawful successor States, insofar as any identified exceptions to the general rule of non-succession to State responsibility may not be understood as applying to them.

(ii) Draft article 6 — General rule

22. While members generally expressed agreement with the rule of non-succession to State responsibility enshrined in draft article 6, several members remarked that the formulation of that draft article was unclear. A number of drafting suggestions were made in that regard, which *inter alia* aimed at clarifying that the responsibility for wrongful acts in cases of succession of States only arose for the State that had committed the wrongful act, except when the draft articles otherwise provided.

23. In relation to the legal basis of the general rule of non-succession, some members expressed support for the view of the Special Rapporteur that such a rule derived from the rules on attribution of conduct enshrined in the articles on responsibility of States for internationally wrongful acts, and in particular that the non-succession rule was a corollary to the definition of State responsibility contained in article 1 thereof. Other members, however, considered that the question of attribution of conduct was distinct from the question of succession to responsibility, and that employing the language of attribution of conduct might generate confusion, because issues of succession in respect to State responsibility only arose in relation to internationally wrongful acts that had already been attributed to the predecessor State under article 2 of the articles on responsibility of States for internationally wrongful acts; in the absence of such attribution, there would be no responsibility to transfer. The view was also expressed that the general rules on attribution of conduct and other rules on State responsibility may in fact be affected by rules on State succession.

24. In relation to paragraph 4 of draft article 6, some members considered that its reference to "reparation" would limit the scope of the draft articles only to certain aspects of State responsibility; it was therefore necessary to clarify the extent of the obligations arising from an internationally wrongful act that would be transferred in cases of succession in respect to responsibility. Other members considered that paragraph 4 undermined the general rule of non-succession enshrined in the first part of draft article 6, and that it conflicted with the general principle of law that only the wrongdoer should be held responsible for a wrongful act.

(iii) Draft article 7 — Separation of parts of a State (secession)

25. The suggestion was made by several members of the Commission to expunge from draft article 7 and its title any reference to "secession", because the term might be interpreted as including unlawful succession. Some members considered that the limited State practice did not support the exceptions to the non-succession rule included in draft article 7. In addition, the expressions "if particular circumstances so require" (in paragraphs 2 and 3), "an organ of a territorial unit" (in paragraph 2), "direct link", and "are assumed" (in paragraph 3) were deemed unclear by a number of members. In relation to paragraph 2,

the view was expressed that when an act of a continuing character was carried out by an organ of the predecessor State that became the organ of the successor State, no transfer of responsibility would occur, but two separate internationally wrongful acts could be established, each attributable to either the predecessor or the successor State. The view was also expressed that some criteria for the apportionment of rights and obligations after succession should be added to this and other draft articles, and that the concept of unjust enrichment might provide additional clarity in that regard. Other members considered that the rules applicable to unjust enrichment might not be pertinent in this context.

26. Several members expressed their support in relation to paragraph 4 of draft article 7, and a number of drafting proposals were made to clarify further the link between the attribution of conduct of an insurrectional or other movement and the consequent transfer of responsibility at the date of succession. Drafting suggestions were also made with a view to combining this draft article with draft articles 8 and/or draft article 9.

(iv) Draft article 8 — Newly independent States

27. A number of drafting suggestions were made in relation to draft article 8; the article received the support of several members of the Commission. Other members questioned whether it would still be necessary for the Commission to adopt a draft article devoted to "newly independent States", as the concept now seemed anachronistic. Other members, however, remarked that the General Assembly maintained a list of non-self-governing territories, and that cases of succession based on the principle of self-determination raised certain legal specificities that should not be overlooked. Several members proposed that the definition of "newly independent States" be included among those in draft article 2.

28. The view was expressed that, among the criteria to be considered under paragraph 2 of draft article 8, reference should be made to the possible direct link between an internationally wrongful act and the population, rather than just the territory, of the successor State. In relation to paragraph 3, some members considered that the concept of "insurrectional or other movement" would comprise "national liberation" movements, and it was thus possible to adopt the same language employed in paragraph 4 of draft article 7.

(v) Draft article 9 — Transfer of part of the territory of a State

29. In relation to draft article 9, several members remarked that their views concerning draft article 7 applied *mutatis mutandis*, including those concerning the limited State practice in support of the exceptions to the general rule of non-succession and the need to clarify the meaning of some of the terms employed. A number of drafting suggestions were made.

(vi) Draft article 10 — Uniting of States

30. Several members of the Commission remarked that draft articles 10 and 11, which concerned the situation where the predecessor State no longer existed, espoused a general presumption of succession to responsibility that was inconsistent with the general rule of non-succession in respect to State responsibility identified in draft article 6. In their view, there was not sufficient State practice in support of such a presumption of succession, which found support only in some academic writings and in the work of the Institute of International Law. The examples provided by the Special Rapporteur often concerned expropriation, which was not an internationally wrongful act *per se*. Some members underlined that, in the absence of consent, it was simply not possible to deduce any assumption of obligations by the successor State. Some members considered that the policy rationale underlying such a reversal of the general rule of non-succession may in fact lead to inequitable or unjust results. In addition, it was remarked that attaching legal consequences to the predecessor State remaining in existence, or otherwise, may lead to discriminatory results. Other members expressed support for draft articles 10 and 11, as they established the certainty of legal consequences for all internationally wrongful acts, and thus preserved the rights of injured parties.

31. A number of drafting suggestions were made in relation to draft article 10, some of which aimed at removing any reference to the distinction between types of unification of

States, given that the legal consequences in terms of succession to responsibility were deemed to be identical.

(vii) Draft article 11 — Dissolution of State

32. In addition to the observations that applied to both draft article 10 and draft article 11 mentioned above, a number of members of the Commission remarked that draft article 11 posed specific challenges and would require careful consideration in the light of the highly context-specific nature of dissolution of States.

33. Several members of the Commission considered that paragraph 1 of draft article 11 was unclear, especially in relation to the expression "subject to an agreement"; it was important to specify which parties would be involved in such an agreement, and whether the scope of the agreement would be the apportionment of responsibility among successors or the transfer of responsibility itself. In relation to paragraph 2, a number of members considered that the introduction of a duty to negotiate would not be appropriate, and that it was therefore important that the wording remained hortatory in nature. A number of drafting suggestions were made.

(c) Final form

34. In terms of the final form that the project should take, a number of members noted that some States had expressed their preference for a form other than draft articles, such as draft guidelines or conclusions, although other States had supported the form of draft articles. The view was expressed that the final form could be decided upon at a later stage. Some members remarked that it could be useful to consider the possibility of drafting model clauses to be used as a basis for negotiation of agreements on succession.

(d) Future programme of work

35. Members of the Commission generally agreed with the proposals by the Special Rapporteur concerning the future programme of work. The view was also expressed that the Special Rapporteur should consider further topics, such as the role of international organizations and the effect of non-recognition policies on issues of succession to responsibility.

3. Concluding remarks of the Special Rapporteur

36. In response to the debate, the Special Rapporteur expressed his gratitude for the many comments received and welcomed the prevailing sense of the debate, which had focused on how to best approach the topic in a balanced manner. In relation to the doubts that had been expressed as to the feasibility and suitability of the topic for codification, the Special Rapporteur reiterated his view that the topic was suitable for codification and progressive development, as it aimed to shed more light on the gaps left by the previous codification work of the Commission in the two fields of State responsibility and succession of States. The topic intended to explain the possible impact of succession of States on general rules of State responsibility, not at creating new rules on the succession of States. In his view, the fact that such issues had been deliberately left unaddressed during the Commission's work on State responsibility was an invitation rather than a hindrance to further consideration by the Commission. In the Special Rapporteur's view, nothing in the articles on responsibility of States for internationally wrongful acts suggested that the legal consequences of an internationally wrongful act simply disappeared because of State succession. The Special Rapporteur also indicated that he agreed that the Commission should consider changing the title of the topic to "State responsibility problems in cases of succession of States".

37. Concerning issues of methodology, and in particular comments made by members as to available practice, the Special Rapporteur underlined his intention to combine the progressive development of international law and its codification, an approach consistent with the mandate of the Commission. He indicated that there was little distinction between *lex ferenda* and policy considerations, and that State practice, including bilateral and multilateral treaties, was also influenced by policy considerations.

38. The Special Rapporteur also noted that a slow but growing trend of case law was emerging concerning succession to State responsibility, especially among regional human rights courts. He agreed that, in his report, he had greatly relied on academic writings, but considered that this was consistent with the role of writings as subsidiary means for the identification of rules of law. In addition, the Special Rapporteur stressed that the existence of early drafts on the topic by private codification bodies, and in particular the Institute of International Law, confirmed the relevance of the topic. He added that the Commission was, however, not bound by previous work undertaken by such bodies.

39. In relation the question of the identification of a general rule underlying the topic of State succession in relation to State responsibility, the Special Rapporteur agreed that such a general rule, or rules, was needed, together with exceptions applicable to individual categories of succession. For the purpose of creation of responsibility of a State (based on its own internationally wrongful act), non-succession was an absolute rule: both the act and the international obligation breached must refer only to the predecessor State. The legal consequences of a wrongful act, including circumstances precluding wrongfulness, the obligation of cessation, and possible countermeasures, would all in principle remain applicable to the predecessor State. The successor State would not become responsible on the basis of a wrongful act that it did not commit. Rather, it may be responsible for its own wrongful acts, in cases such as continuing breaches or attribution of conduct of insurrectional or other movements. In addition, some exceptions to the rule of non-succession existed in relation to certain consequences of an internationally wrongful act that did not disappear if the predecessor State no longer existed. These consequences continued to exist in a similar manner as territory, population, property or debts continued to exist in cases of succession. The exceptional grounds on which this was the case were certainly open to debate. Nonetheless, such circumstances did not determine a situation in which the successor State would become responsible, or be blamed, for acts that it did not commit; it would rather have to be commended for not leaving the injured States or injured persons without any reparation.

40. The Special Rapporteur pointed out that the basic distinction between cases where the predecessor State continued to exist and cases where it no longer existed was based on the description of real differences and was consistent with the recognized categories of succession, regardless of possible policy considerations. The specific rules and exceptions to be drafted in that regard had to be worded in such a way as to prevent unjust and inequitable results. With reference to the separation of the issues of succession to obligations arising from an internationally wrongful act of a predecessor State (considered in the second report) from the issues concerning the rights and claims arising from an internationally wrongful act injuring a predecessor State (to be considered in the third report), the Special Rapporteur noted that duplication could be avoided by eventually merging draft articles, as needed.

41. The Special Rapporteur also expressed his agreement with several other comments and proposals, including: the need to consider the link between an internationally wrongful act and the population of a successor State; the relevance of the consent of the injured State or person to any undertaking of responsibility by the successor State; the importance of agreements and unilateral declarations in matters of succession; and the need to include a provision expressly indicating the subsidiary character of the draft articles. He also agreed that a number of definitions would need to be added to draft article 2, and considered that a number of the drafting proposals concerning the structure and content of the draft articles should be upheld.

42. In the Special Rapporteur's view, the draft articles should also address subjects other than States as possible injured subjects. Such an approach was consistent with the first part of the articles on responsibility of States for internationally wrongful acts, which also applied to breaches of international obligations of States owed to other actors.

43. In relation to draft article 5, the Special Rapporteur reiterated that this proposal was consistent with the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983. He noted that it remained unclear whether modern international law fully regulated certain facts in relation to the creation of States. Draft

article 5 aimed at positively delineating the material scope of the draft articles in a manner consistent with the previous work of the Commission on succession. The draft article in no way sought to grant any privileges to unlawful successor States by exempting them from responsibility; rather, it concerned both the possible transfer of obligations and the transfer of rights arising from responsibility.

44. As to draft article 6, the Special Rapporteur was open to several of the suggestions received to improve its clarity. Concerning paragraph 4, the Special Rapporteur indicated that the reference to reparation did not exclude the relevance of other rules of State responsibility, which remained applicable to the predecessor State.

45. In relation to draft article 7, the Special Rapporteur agreed with a number of drafting suggestions, including expunging any reference to "secession" therefrom; in addition, the expression "if particular circumstances so require" needed further clarification or removal. As to draft article 8, the Special Rapporteur indicated that, in his view, all categories of succession previously considered by the Commission should be maintained, including the category of newly independent States. Regarding both draft article 7 and draft article 9, the Special Rapporteur indicated that the term "an organ of a territorial unit" referred to situations where such organs had a substantive degree of autonomy, such as in the case of federal States. Furthermore, he agreed with a number of drafting proposals, including those aimed at combining draft articles 7, 8 and 9 in a single provision. The Special Rapporteur also clarified that it was not the purpose of draft articles 7, 8 and 9 to create obligations entailing the automatic transfer of obligations to the successor State.

46. Regarding draft articles 10 and 11, the Special Rapporteur agreed with many of the comments made during the plenary debate. He underlined, however, that draft article 10 created a rebuttable presumption rather than a rule of automatic succession replacing that of non-succession in all circumstances. Furthermore, in his view, cases concerning unlawful expropriation could not be discounted as irrelevant. As to draft article 11, the Special Rapporteur underlined that it was as a general, introductory provision that would later be complemented by another draft article on the criteria and rules for the apportionment of obligations arising from the internationally wrongful act of a predecessor State that had ceased to exist.

47. In relation to the future programme of work, the Special Rapporteur took note of the agreement of some members with his proposed programme of work and agreed that the focus of the third report on transfer of rights or claims of an injured predecessor might need careful consideration to avoid duplication of work and that the role of international organizations could also be considered at a later stage together with other issues.